July 2015

Dolphin Protection and the Mammal Protection Act Have Met Their Match: The General Agreement on Tariffs and Trade

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DOLPHIN PROTECTION AND THE MAMMAL PROTECTION ACT HAVE MET THEIR MATCH: THE GENERAL AGREEMENT ON TARIFFS AND TRADE

I. INTRODUCTION

The conflict between international environmental conservation and international free trade is not a battle between good and evil, but a struggle between reconciling the good with the good.[1] Indeed, the international community has recognized the growing "need for rules to enhance [the] positive interaction between trade and environmental measures, for the promotion of sustainable development."[2] The contracting parties to the General Agreement on Tariffs and Trade [hereinafter GATT] agreed to formalize this principle during the Uruguay Round in April of 1994 by establishing a Committee on Trade and the Environment [hereinafter CTE].[3] This was an important step toward commingling international trade and

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[1] Bill Bryant, *Global Trade Needn't Come at Expense of Environment*, SEATTLE POST-INTELLIGENCER, June 27, 1997, at A15 (quoting William Clark who aptly notes that "Humanity is entering an era of chronic, large-scale and extremely complex syndromes of interdependence between the global economy and the world environment . . . . [A] major challenge of the coming decades is to learn how long-term, large-scale interactions between environment and development can be better managed to increase prospects for economically sustained improvements in human well-being.") (internal quotations omitted).

[2] Trade and Environment, *GATT Ministerial Decision of 14 April 1994*, 33 I.L.M. 1125, 1268 (1994); *see also Kyoto Protocol to the United Nations Framework Convention on Climate Change* (UNFCC): *Third Meeting of the Conference of Parties* (COP), Kyoto, Japan, Jan., 1997, *reprinted in* ALI-ABA Course of Study: Environmental Law, Feb. 11-14, 1998, Bethesda, Md., at 193 (instituting specific measures to reduce the aggregate effects of greenhouse gases on global warming in concert with members of the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted 16 Sept. 1987; to date thirty-nine countries have committed to quantified emission limitations and reductions.); Richard N. Cooper, *Toward a Real Global Warming Treaty*, 77 FOR. AFF. 66 (Mar./Apr. 1998) [hereinafter Cooper, *Real Global Warning*] (outlining the multilateral commitment of the members of the Organization of Economic Cooperation and Development (OECD) and the Montreal Protocol to cut their greenhouse gas emissions by 2010).

[3] Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation*, 91 AM. J. INT'L L. 268, 269 (1997) [hereinafter Schoenbaum, *Search for Reconciliation*] (quoting the Ministerial Decision adopted by the GATT members at the final meeting of the Uruguay Rounds). The CTE under the[World Trade Organization hereinafter WTO] in 1994 was charged with the following issues:

> (1) the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral agreements;

environmental policies as GATT had been seen as a strictly trade oriented, multilateral agreement.[4]

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(2) the relationship between the environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
(3) the relationship between the provisions of the multilateral trading system and:
(a) charges and taxes for environmental purposes
(b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labeling and recycling;
(4) the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
(5) the relationship between the dispute settlement mechanisms in the multilateral trading system and those found in multilateral environmental agreements;
(6) the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions;
(7) the issue of exports of domestically prohibited goods;
(8) the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights;
(9) the work programme envisaged in the Decision on Trade in Services and the Environment; and
(10) input to the relevant bodies in respect of appropriate arrangements for relations with intergovernmental and non-governmental organizations.

Id. (quoting Ministerial Decision, 33 I.L.M. 1267, 1267-1269) (1994) (internal quotations omitted). The creation of the WTO worried many environmentalists because of its "functioning" institutional structure and its ambiguous goal set forth in the preamble: "optimal use of the world's resources in accordance with the objective of sustainable development." Jennifer Shultz, *The GATT/WTO Committee on Trade and Environment--Toward Environmental Reform*, 89 AM. J. INT'L L. 423, 424-26 (1995) [hereinafter Shultz, *GATT/WTO Committee*] (quoting Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement Establishing the World Trade Organization, GATT Doc. MTN/FA, Preamble (Apr. 15, 1994), *reprinted in* 33 I.L.M. 1125, 1144 (1994)) (noting also that the creation of the CTE was viewed by environmentalists as an important change in GATT's approach toward uniting trade and environmental considerations).

[4] Schoenbaum, *Search for Reconciliation*, *supra* note 3, at 268 (noting that the GATT Council established a Working Group on Environmental Measures and International Trade in 1971 but that the group had not met for over twenty years); *see also* Andrea C. Durbin, *Trade and the Environment: The North-South Divide*, ENV'T, Sept. 1, 1995 at 16 (addressing GATT and the environment from an economic prospective and noting that although environmentalists warned that trade rules "threatened global environmental protection . . . environmental groups from industrialized and developing countries differ significantly on the substantive issues and the process for resolving them."). Hence, while nations such as the United States are economically stable enough to construe GATT as more than a liberal

Partially due to the international community's historic lack of initiative with respect to protecting the environment,[5] and also due to the increasing pressure from its citizens to protect depleting sea mammal populations,[6] the United States (U.S.) Congress enacted the Marine Mammal Protection Act of 1972 (MMPA).[7] The MMPA is a unilateral legislative measure imposed by the U.S. to enforce its environmental policy of reducing dolphin mortality by employing domestic fishing

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trade mechanism, developing countries view GATT as the key to economic development. *Id.* (noting that the United States is more concerned with GATT increasing 'the primacy of the global trade rules over all other policy goals and domestic laws on the federal, state and local levels,' as an issue of sovereignty, compared with developing countries who perhaps view trade as more vital to their status in the international community)(quoting Ralph Nader's testimony before the Senate Foreign Relations Committee).

[5] Paul J. Yechout, Note, *In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards*, 5 MINN. J. GLOBAL TRADE 247 (1996) [hereinafter Yechout, *In the Wake of Tuna II*] ("From its inception, the General Agreement on Tariffs and Trade (GATT) has focused on economic matters, often to the exclusion of environmental concerns.").

[6] Thomas E. Skilton, Note, *GATT and the Environment in Conflict: The Tuna-Dolphin Dispute and the Quest for an International Conservation Strategy*, 26 CORNELL INT'L L.J. 455, 455 [(1993) hereinafter Skilton, *GATT and the Environment in Conflict*] (noting that the MMPA was "[e]nacted in response to the public outcry over the slaughter of several species of marine mammals . . . ."). The initial outcry from environmentalists over the incidental catch of dolphins by tuna fishing vessels occurred as early as the 1960s when the number of "U.S. purse seiners increased significantly." United States International Trade Commission (U.S.I.T.C.), *Tuna: Competitive Conditions Affecting the U.S. and European Tuna Industries in Domestic and Foreign Markets*- Report to the Committee on Finance, U.S. Senate, and the Committee on Ways and Means, U.S. House of Representatives, Investigation No. 332-291 Under Section 332 of the Tariff Act of 1930, USITC Pub. 2339 (Dec. 1990), *available in* LEXIS, ITC File, 1990 ITC LEXIS 395, at 30 [hereinafter USITC, 1990] (noting that the MMPA "was enacted by Congress in 1972 in response to public concern that certain marine mammal populations, including dolphins, were being harvested in such numbers that they risked becoming endangered species.").

[7] 16 U.S.C. § 1361-1407 (1985) [hereinafter "MMPA"], *as amended by* the International Dolphin Conservation Program Act, 111 Stat. 1122 (1997) [hereinafter "IDCPA"]. The MMPA was initially amended in 1981. *See generally* Caroline E. Coulston, Comment, *Flipper Caught in the Net of Commerce: Reauthorization of the Marine Mammal Protection Act and Its Effects on Dolphin*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 97, 110-12 (1990) (addressing the 1981 amendments to the MMPA stemming from the lack of progress achieved in the reduction of dolphin and other marine mammal mortality rates). Amendments were later added to the MMPA in 1984 and again in 1988. Act of July 17, 1984, Pub. L. No. 98-364, Stat. 440; MMPA Amendments of 1988, Pub. L. No. 100-74, 102 Stat. 4755.

regulation and applying trade embargoes upon non-conforming foreign countries.[8] Initially, the statute was interpreted as an exercise of domestic environmental policy addressing the devastating impact of certain commercial fishing techniques used in U.S. territorial waters and on the high seas.[9] However, in 1991 the MMPA became recognized as an international trade barrier after GATT's Dispute Resolution Panel rendered a decision in favor of Mexico who had complained that the application of the MMPA was inconsistent with the U.S.'s obligations under GATT.[10]

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[8] Skilton, *GATT and the Environment in Conflict, supra* note 6, at 455-56 (describing the MMPA as containing "provisions which specifically seek to reduce the number of dolphins killed by tuna fishing vessels on the high seas."). Section 1371 of the MMPA titled "Moratorium on Taking and Importing Marine Mammals and Marine Mammal Products," specifically provides, *inter alia*, that "[t]he Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." 16 U.S.C. § 1371(a)(2) (Supp. 1997).

[9] United States v. Mitchell, 553 F.2d 996, 1003 (5th Cir. 1977) ("The [B]asic purpose of . . . [the MMPA] . . . appears to be the protection of marine mammals only within the territory of the United States and on high seas. Conservation in other [sovereign] states is left to diplomatic [relations]."); *see also* LouAnna C. Perkins, Comment, *International Dolphin Conservation Under U.S. Law: Does Might Make Right?*, 1 OCEAN & COASTAL L.J. 213, 214 (1995) [hereinafter Perkins, *Does Might Make Right?*] (describing the enactment of the MMPA as an attempt "to balance the need for dolphin protection with the economic interests of U.S. tuna fisherman.") Hence, there appeared to be little attention given to the international ramifications of the MMPA until the 1980s. *See generally* James Joseph, *The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts*, 25 OCEAN DEV. & INT'L L. 1 (1994) (outlining the history of domestic concerns over dolphin mortality and the progress leading up to the implementation of a multinational program involving ten nations stemming from the International Dolphin Conservation Act of 1992).

[10] *See Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna*, Aug. 16, 1991, *reprinted in* 30 I.L.M. 1594 (1991) [hereinafter *Tuna/Dolphin I, Panel Report*]. The prospect that the United States was in violation of its obligations as a signatory to GATT was of particular importance in light of Justice Holmes' determination that a valid treaty supersedes state authority as the supreme law of the land under Article VI of the Constitution. Missouri v. Holland, 252 U.S. 416, 435 (1920), *aff'g*, U.S. v. Samples, 258 F. 479 (W.D. Mo. 1919) (noting also that the federal government can act by means of a treaty in the "national interest of very nearly the first magnitude . . . [that] can be protected only by national action in concert with . . . another power."). However, when a conflict arises between a valid treaty and a congressionally enacted statute, whichever was enacted later controls, under the rule that "the last expression of the sovereign will must control." LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 226 (2d ed. 1988).

This Comment focuses on the Panel Reports issued in 1991 and 1994, commonly referred to as Tuna/Dolphin I and II respectively, which addressed the MMPA's conflicts with GATT. Part I briefly outlines the purpose of the MMPA and its general regulatory scheme as it affects foreign fishing fleets. Part II examines the Panel Reports and their conclusions. Part III analyzes the reactions of both the United States and the international community in the wake of the Panel Reports and presents several approaches for avoiding future conflicts between trade and the environment. The Comment concludes with a global outlook on the possibility of harmonizing trade with environmental conservation in the near future.

II. THE MARINE MAMMAL PROTECTION ACT OF 1972

A. Purpose of the Act

The principle goal of the MMPA is to ensure the vitality of various species of marine mammals nearing extinction or depletion due to human activity.[11] The Act expressly acknowledges the international significance of marine mammals.[12] Reaching beyond the territorial waters of the U.S., the Act seeks to prevent certain species of marine mammals from falling "[below their] optimum sustainable

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[11] MMPA, 16 U.S.C. § 1361(1), (2) (1985). Section 1361(1) provides that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361 (1) (1972); *see also, infra* Part III, notes 120, 122, and accompanying text (discussing the International Dolphin Conservation Program Act (IDCPA), amending the MMPA). The IDCPA amends the purposes of the MMPA to include the following:

> (1) to give effect to the Declaration of Panama, signed October 4, 1995, by the Governments of Belize, Columbia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, the United States of America, Vanuatu, and Venezuela, including the establishment of the International Dolphin Conservation Program, relating to the protection of dolphins and other species, and the conservation and management of tuna in the eastern tropical Pacific Ocean;
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> (2) to recognize that nations fishing for tuna in the eastern tropical Pacific Ocean have achieved significant reductions in dolphin mortality associated with that fishery; and
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> (3) to eliminate the ban on imports of tuna from those nations that are in compliance with the International Dolphin Conservation Program.

International Dolphin Conservation Program Act, Pub. L. No. 105-42, 11 Stat. 1122 (1997) (codified as amendment to the Marine Mammal Protection Act of 1972, 16 U.S.C. § 1362-1407) (1985).

[12] 16 U.S.C. § 1361(6) (1985) ("Marine mammals have proven themselves to be resources of great international significance, aesthetic and recreational as well as economic . . . .").

population"[13] on the high seas.[14] The basic Congressional mandate required that the MMPA "[be administered for the benefit of the protected species rather than for] the benefit of commercial exploitation."[15] Thus, disputes have arisen under U.S.

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[13] 16 U.S.C. § 1362 (9) (1997) ("The term 'optimum sustainable population' means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.").

[14] Earth Island Institute v. Mosbacher, 929 F.2d 1449, 1450 (9th Cir. 1991), *vacated for lack of jurisdiction by* Earth Island Institute v. Brown, 28 F. 3d 76 (9th Cir. 1993) ("Congress enacted specific standards intended to ensure that foreign tuna fishing fleets would reduce the number of dolphins killed and to protect certain endangered subspecies of dolphins."). The term "high seas" is defined under the U.N. Convention on the Law of the Sea (Law of the Sea) to mean "all parts of the sea that are not included in the territorial sea or internal waters of a State." Convention on the High Seas, Sept. 30, 1962, 13 U.S.T. 2312. However, the United States refused to sign the 1982 U.N. Convention on the Law of the Sea (LOSC), which took the place of the 1962 Convention. U.N. Document A/CONF.62/122 of Oct. 7, 1982 [hereinafter, LOSC]; *ee also* Raul Pedrozo, *The International Dolphin Conservation Act of 1992: Unreasonable Extension of U.S. Jurisdiction in the Eastern Tropical Pacific Ocean Fishery*, 7 TUL. ENVTL. L.J. 77, 86 (1993)[hereinafter Pedrozo, *Unreasonable Extension*](describing the U.S.'s refusal to sign as "[eliminating] further hope of reaching international consensus on the issue of fishery management . . ."). In 1983, President Ronald Reagan established an Exclusive Economic Zone (EEZ) "in which the United States [would] exercise sovereign rights in living and nonliving resources within 200 nautical miles of its coast." 1 Pub. Papers 383 (Mar. 10, 1983) (stating the U.S.'s interest in exercising its jurisdiction over mineral resources). This was explicit recognition that the non-seabed portions of the LOS reflected customary international law and gave the U.S. the authority to "take limited additional steps to protect the marine environment" in the EEZ. *Id.* The scope of the EEZ set forth in the LOS is stated as follows: "The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." LOSC, *supra,* at art. 57. The limits on the territorial sea is set at "12 nautical miles, measured from baselines determined in accordance" with Articles 4-16 of the Convention. *Id.* at art. 3.

According to the United States International Trade Commission, the U.S. does not impose unilateral jurisdiction over tuna within its 200-mile fishery conservation zone and the U.S. does not recognize such jurisdiction by other nations. *See* USITC, 1990, *supra* note 6, at 33-34 (stating that the basis for this policy rests in the fact that "tuna are highly migratory, and it is therefore the U.S. position that no one nation has the ability to effectively manage tuna resources."). Instead, the U.S. has preferred to manage migratory areas adjacent to U.S. territorial waters through multilateral cooperation. *Id.* at 34.

[15] Committee for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297, n.24 (D.C. Cir. 1976), *aff'd,* 540 F.2d 1141 (1976) ("Congress enacted the MMPA for one basic purpose: to provide marine mammals, especially porpoise, with necessary and extensive

domestic law and under GATT regarding how far the Act may go in achieving this environmental policy.[16]

B. YellowFin Tuna and Purse Seine Fishing Techniques

The Panel Decisions in Tuna/Dolphin I and Tuna/Dolphin II involved the application of the MMPA against foreign commercial fisherman operating in the Eastern Tropical Pacific Ocean (ETP)[17], who used purse seine fishing techniques to capture yellowfin tuna.[18] For some unexplained reason, yellowfin tuna swim

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protection against man's activities."). The court in addressing whether the National Marine Fisheries Service failed to meet specific requirements in issuing permits providing for the incidental taking of marine mammals rejected the notion that the MMPA required only that "amount of protection which is consistent with the maintenance [of] a healthy tuna industry." *Id.* at 309. Hence, the protection afforded to marine mammals under the MMPA does not include a balancing between the interests of the fishing industry and the marine mammals themselves. *Id.*

[16] In a line of cases asserted against the sitting Secretary of Commerce, the Earth Island Institute sought to enforce a primary embargo of tuna products against Mexico under the MMPA. *See Mosbacher*, 929 F.2d at 1449 (referred to as "Earth Island I") (requiring an embargo of Mexican imports of tuna products); Earth Island Institute v. Mosbacher, 785 F.Supp. 826 (N.D. Cal. 1992) (referred to as "Earth Island II") (ordering the Secretary of Commerce to institute measures to enforce the primary and secondary embargoes required under the MMPA against Mexico), *vacated for lack of jurisdiction by* Earth Island Institute v. Brown, 28 F.3d 76 (9th Cir. 1993) (referred to as "Earth Island III") (holding that 28 U.S.C. §1581 (1988) provides exclusive jurisdiction of embargo issues to the United States Court of International Trade) (citing K Mart Corp. v. Cartier, Inc., 485 U.S. 176 (1988). The Ninth Circuit's decision in Earth Island I led Mexico to file a protest to the embargoes under GATT. *See* Perkins, *Does Might Make Right*, *supra* note 9, at 232 ("Shortly after Earth Island I was decided, Mexico registered a protest that embargoes imposed pursuant to the MMPA by the United States violated provisions of the General Agreement on Tariffs and Trade (GATT).").

[17] The National Marine Fisheries Service (NMFS) currently defines the eastern tropical Pacific Ocean as "bounded by 40 <<degrees>> N. latitude, 40 <<degrees>> S. latitude, 160 <<degrees>> W. longitude and the coastlines of North, Central and South America." 50 C.F.R. § 216.3 (1997). This area encompasses all of the Pacific Ocean, east of Hawaii and between Canada and Mexico extended.

[18] *See* Stanley M. Spracker and David C. Lundsgaard, *Dolphins and Tuna: Renewed Attention on the Future of Free Trade and Protection of the Environment*, 18 COLUM. J. ENVTL. L. 385, 388 (1993) [hereinafter Spracker and Lundsgaard, *Dolphins and Tuna*] (explaining the use of purse seine nets and the various devises used to trap tuna and consequently dolphins as well). "The nets used by tuna harvesters, called 'purse seine' because their operation resembles the closing of a purse, are then pulled up from beneath the tuna and the dolphins [using] a system of weights and floats." *Id.*; *see also Tuna/ Dolphin*

underneath schools of dolphins in the ETP.[19] With the advent of extensive use of purse seine fishing in the 1950's, millions of dolphins were netted along with tuna and needlessly killed.[20] Recognizing this problem, Congress provided specific

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I, Panel Report, reprinted in, 30 I.L.M. 1594 (1991); *Tuna/Dolphin II*, Dispute Settlement Report on United States Restrictions on Imports of Tuna, July, 1994, *reprinted in*, 33 I.L.M. 839 (1994) [hereinafter *Tuna/Dolphin II, Panel Report*]. Both panel reports began their analysis by describing the prevalence of purse seine fishing techniques and acknowledging their adverse impact on marine mammal life. *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1598 ("The last three decades have seen the deployment of tuna fishing technology based on the "purse-seine" net in many areas of the world."); Tuna/Dolphin II, Panel Report, 33 I.L.M. at 845-846 ("Since the 1960's, the practice of intentionally setting purse seine nets on dolphins to catch tuna has resulted in the incidental killing and injury of many dolphins.").

[19] *Mosbacher*, 929 F.2d at 1449; *See also* Dept. of Comm., National Oceanic and Atmospheric Administration (NOAA), *Supplementary Information on the Taking and Importing of Marine Mammals*, 56 Fed. Reg. 4981 (1991) (making a similar finding that "For unknown reasons, yellowfin tuna tend to congregate beneath schools of dolphin in the eastern tropical Pacific Ocean (ETP). Large purse seine nets are set around the dolphins, capturing the tuna and dolphin together."); *cf.* USITC, 1990, *supra* note 6, at 36-37 (describing the cost of purse seine fishing vessels, how they are equipped, and the type of vessels a majority of U.S. fisherman use to harvest tuna). Some fishing vessels are known as "superseiners" because they can carry up to 2,000 tons of tuna harvest (measured in round fish weight), spread almost 200 feet in length and 75 feet in width, and cost nearly $15 million U.S. to construct. *Id.* These vessels usually have a crew of around 18 and are equipped with highly advanced satellite navigation and sonar systems, automatic monitoring systems, and helicopters. *Id.* Although the bulk of U.S. tropical tuna is caught using these vessels, the majority of U.S. albacore is caught using "trollers" which are significantly smaller and easily adaptable to other fisheries such as salmon and crab. *Id.* at 37. Prior to 1960, the majority of U.S. tuna was harvested using "bailboats," which are specially equipped to keep the tuna catches frozen. *Id.*

[20] Earth Island Institute v. Brown, 865 F. Supp. 1364, 1366 (N.D. Cal. 1994) ("Between 1959, when purse seine nets became widely used and 1972, millions of dolphins were killed by tuna fisherman in the ETP."). The federal court for the Northern District of California held that permits issued to commercial fisherman under the MMPA prohibited holders of such permits from continuing to kill northeastern offshore spotted dolphins in the ETP when the National Marine Fisheries Service (NMFS) had listed such species as depleted. *Id.* at 1369. This finding was consistent with Section 1371(a)(3)(B) of the MMPA which states, *inter alia*, that:

> (B) Except for scientific research purposes . . . during the moratorium, no permit may be issued for the taking of any marine mammal which has been designated by the Secretary [of Commerce] as depleted, and no importation may be made of any such animal.

16 U.S.C. § 1371 (a) (3) (B) (Supp. 1997).

provisions under the MMPA to severely restrict the use of purse seine fishing techniques in the ETP.[21]

Section 1371 of the MMPA mandates that the Secretary of the Treasury "ban [the] imports of yellowfin tuna products from a foreign nation until the Secretary of Commerce certifies that that nation's incidental kill rate of dolphins is comparable to that of the United States."[22] The comparable incidental kill rate is based on a restrictive sliding scale which initially requires that a foreign nation's kill rate not be more than two times that of the United States.[23] An "incidental catch" is defined by the National Marine Fisheries Service (NFS) as one in which a marine mammal is captured "because it is directly interfering with commercial operations, or . . . as a consequence of the steps used to secure the fish in connection with commercial fishing operations."[24] However, the catch is only incidental if the

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[21] *Brown*, 865 F. Supp. at 1367 (quoting 16 U.S.C. § 1371(a)(2)(1997), which provides that it is Congress' goal to reduce the incidental kill rates by commercial fishing to "insignificant levels approaching zero" and in the case of purse seine fishing for yellowfin tuna, the techniques should embody "the application of the best marine mammal safety techniques and equipment that are economically and technologically practicable.") (internal quotations omitted); *see also* American Tunaboat Ass'n v. Baldridge, 738 F.2d 1013, 1014 (9th Cir. 1984) (noting that it was the high mortality rate of dolphins resulting from the use of purse seine nets that led to the enactment of the MMPA).

[22] *Mosbacher*, 929 F.2d at 1450 (quoting 16 U.S.C. § 1371(a)(2) (1997)). As amended, this section provides that "[t]he Secretary of the Treasury shall ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards." 16 U.S.C. § 1371 (a)(2) (Supp. 1997). The following analysis of the MMPA addresses the relevant provisions prior to the 1997 amendments by the International Dolphin Conservation Program Act (IDCPA). *See infra* Part III, note 120 and accompanying text (discussing IDCPA Amendments as a result of Tuna/Dolphin I and II).

[23] 16 U.S.C. § 1371(a)(2)(B)(ii)(II) (1997) (which provides that "the average rate of incidental taking by vessels of the harvesting nation is no more than 2.0 times that of [the] United States vessels during the same period by the end of the 1989 fishing season and no more than 1.25 times that of [the] United States vessels during the same period by the end of the 1990 fishing season and thereafter.").

[24] 50 C.F.R. § 216.3 (1997). The Department of Commerce through its statutory authority under sections 1373 and 1382 created the National Marine Fisheries Service (NFS) and the National Oceanic and Atmospheric Administration (NOAA) to promulgate appropriate regulations pursuant to the MMPA. The former defines such terms as an "incidental catch," while the latter is charged with determining which species of porpoise are 'disadvantaged or 'depleted' within the meaning of the MMPA. *See infra* note 25, (discussing the National Oceanic and Atmospheric Authorization Act of 1992 (describing

fishing vessel does not intentionally use the sight of the dolphins as a proxy for catching tuna and the fishing vessel immediately releases any uninjured dolphins entangled in the purse seine nets.[25]

Foreign fishing vessels exceeding the incidental killing quota or failing to provide data by July 31 of each year[26] (evidencing compliance), are subjected to an

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the duties of the NOAA). The differences between the two agencies might be more easily characterized as interpretive versus scientific with regard to their definitional and regulatory roles.

[25] 50 C.F.R. § 216.3 (1997) (adding that an incidental catch will be so characterized only if the marine mammal taken is immediately "returned to the sea with a minimum of injury and further, that the taking of a marine mammal, which otherwise meets the requirements . . . shall not be considered an incidental catch of the mammal if it is used subsequently to assist in commercial fishing operations."). In 1992, Congress considered a bill entitled "An Act to authorize appropriations for the National Oceanic and Atmospheric Administration for fiscal year 1992. 138 CONG. REC. S17411-02 (1992); 138 CONG. REC. H11795-01 (1992) (addressing amendments to the National Oceanic and Atmospheric Administration Act, Pub. L. 98-210, 97 Stat. 1409, 16 U.S.C. § 1384 (1981))[hereinafter, NOAA Act]. Both the House of Representatives and the Senate agreed to increase the NOAA's budget for the "Development of Dolphin-Safe Methods of Tuna Fishing," and amended the NOAA Act to clarify what the duties of the NOAA were in allocating these funds:

> Section 2 (as amended)
> (d) . . . [W]ithin six months after the date of enactment of this subsection, the Secretary, in cooperation with the Inter-American Tropical Tuna Commission and after consultation with interested persons, shall publish a program for public comment that shall provide for-
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> (1) cooperative research to improve understanding of the behavioral association of dolphins and yellowfin tuna in the eastern tropical Pacific Ocean;
> (2) development, testing, and implementation of new methods of locating and catching yellowfin tuna without the incidental taking of dolphins; and
> (3) appropriate measures to ensure program participation and sharing of associated costs by each foreign government that conducts, or authorizes its nationals to conduct, yellowfin tuna fishing in the eastern tropical Pacific Ocean.

Id. at S17415; H11799.

[26] *Mosbacher*, 929 F.2d at 1450-51. The rule quoted by the Ninth Circuit has been revised as a result of the court's holding. 50 C.F.R. § 216.24(e)(5)(iv) (1997). The regulation now provides that a foreign nation may request a review of whether the nation is maintaining compliance with the quota requirements by submitting data of fishing trips between October 1 and September 30 of a given year by December 1. *Id.*

embargo against the importation of their fish products.[27] Section 1371 allows the issuance of permits for the incidental taking of marine mammals during commercial fishing operations.[28] However, the permit may only be issued by the NMFS if the particular mammal is not considered depleted by more than 60% of its historic population levels.[29] In view of Congress' determination that various species of

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[27] 50 C.F.R. § 216.24(e)(5)(I) (1997) (embargoes are issued by the Secretary of the Treasury upon notification by the NFS); *see also* Yechout, *In the Wake of Tuna II*, *supra* note 5, at 252-53 (noting that the Pelly Amendment to the Fisherman's Protective Act of 1967, gave the President the authority to "ban all fish products from any country whose policies diminish the effectiveness of any international fisheries conservation program") (citing 22 U.S.C. § 1978 (1994).

[28] 16 U.S.C. §1371(a)(1), (2) (Supp. 1997) (providing the specific authority for issuing permits pursuant to § 1371 of the MMPA). Section 1374 specifically authorizes the Secretary of Commerce to issue permits in some of the following conditions:

> (5)(A) Upon request therefor by citizens of the United States who engage in a specific activity (other than commercial fishing) within a specified geographical region, the Secretary shall allow, during periods of not more than five consecutive years each, the incidental, but not intentional, taking by citizens . . . after notice (in the Federal Register and in newspapers of general circulation, and through appropriate electronic media [if the Secretary] . . . .
>
> (i) finds that the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock . . . .

16 U.S.C. § 1371(a)(5)(A)(i) (Supp. 1997). Subsection (h) of § 1374 was amended in August of 1997 by the International Dolphin Conservation Program Act and now provides:

> (h) GENERAL PERMITS. . . .
>
> (1) Consistent with the regulations prescribed pursuant to section 103 of this title and to the requirements of section 101 of this title, the Secretary may issue an annual permit to a United States purse seine fishing vessel for the taking of such marine mammals, and shall issue regulations to cover the use of any such annual permits.

16 U.S.C. § 1374(h)(1) (as amended)(1997).

[29] 58 Fed. Reg. 58285 (1993). The following table illustrates the 1991 incidental kill rate data collected by the Inter-American Tropical Tuna Commission (IATTC), the organization charged with monitoring the incidental mortality rates in the ETP.

dolphins have suffered extensively under purse seine fishing techniques, foreign fishing vessels who account for the largest use of such techniques have felt the brunt of the MMPA and have not received permits easily.[30]

The MMPA has been applied differently between U.S. and foreign fishing fleets. For example, the permit exception under section 1371 is available to both foreign and U.S. fleets but in 1984, Congress statutorily issued a permit to the American Tunaboat Association (ATA) to avoid the complexities of the permit process for U.S. fleets.[31] Another example had to do with the issuance of permits regarding certain specific species of protected mammals.[32] U.S. citizens engaging in commercial fishing operations could obtain a permit for "incidental, but not intentional, takings having a negligible impact" on certain protected mammals under the Act.[33] However, foreign commercial fisherman were not entitled to this same leeway.[34] These types of discriminatory affects eventually led Mexico and members of the European Union to call into question the validity of the MMPA under GATT.

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[30] Earth Island Institute v. Brown, 865 F. Supp. 1364, 1368 n. 4 (N.D. Cal. 1994) (noting that a finding of depletion by the NMFS, though technically applying only to issuance of domestic permits, is particularly significant to foreign fishing vessels due to the comparability requirements noted above) "[T]he Secretary agrees that any such [(finding)] would also affect foreign fleets, which in recent years have become the larger source of dolphin mortality in the ETP." *Id.* Indeed, by 1991 the number of foreign purse seine fishing vessels in the ETP increased nearly seven-fold (from thirteen to ninety) since the MMPA was enacted in 1971. 57 Fed. Reg. 27010, 27013 Tbl. 1 (1992).

[31] *Brown,* 865 F. Supp. at 1368 (In 1984, "Congress bypassed the process for administratively renewing the ATA permit and instead statutorily extended the permit that had been issued to the ATA by the Secretary in 1980."). The permit was codified by 16 U.S.C. § 1374(b)(2) (1985). The ATA is a large organization made up of members who "fish commercially for yellowfin tuna in the eastern tropical Pacific Ocean." American Tunaboat Ass'n v. Baldridge, 738 F.2d 1013, 1014 (9th Cir. 1984).

[32] Kokechik Fishermen's Ass'n v. Secretary of Commerce, 839 F.2d 795 (D.C. Cir. 1988). Japanese commercial fisherman were issued a permit for commercial fishing of salmon because the NMFS determined that their actions had a negligible impact on fur seals protected under the Act. *Id.* The D.C. Circuit rejected the NMFS's determination on numerous scientific and statutory grounds. *Id.*

[33] 16 U.S.C. § 1372(a)(4), *amended and replaced by* 16 U.S.C. § 1372(a)(5) (1997). *See supra* note 28 and accompanying text (discussing § 1374 and the issuance of general permits and permits issued pursuant to § 1371).

[34] *Kokechik,* 839 F.2d at 802 ("The Secretary is not authorized to extend this flexibility to the Japanese . . . If it is appropriate to grant foreign commercial fisherman some leeway to take marine mammals incidentally in carrying out their commercial fishing operations for salmon, it is for Congress, not the Secretary to decide.").

III. TUNA/DOLPHIN I & II: ANALYSIS OF GATT DISPUTE PANEL DECISIONS

A. Tuna/Dolphin I, 1991

In January of 1991, pursuant to Article XXII:2 of GATT, Mexico requested the Contracting Parties to establish a dispute panel for reconciling the tuna import restrictions imposed by the U.S. under the MMPA with the U.S.'s trade obligations under GATT.[35] After consultations between the U.S. and Mexico failed to resolve the matter, the Council of GATT granted Mexico's request for a dispute panel in February of 1991.[36] Three issues made up the gravamen of Mexico's complaint.

First, the MMPA required Mexican fishermen to employ certain fishing technology in the ETP, other than purse seine techniques, that limited the incidental killing or incidental serious injury of marine mammals to levels comparable to U.S. standards.[37] Next, the Act required that any vessel registered in Mexico and fishing for yellowfin tuna must provide yearly data evidencing that their incidental taking of marine mammals was comparable to the U.S. or face an embargo on the importation of fish products.[38] Finally, Mexico protested the application of the

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[35] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. 1594, 1598. Article XXII: 2 of GATT provides:

> The CONTRACTING PARTIES, may, at the request of a contracting party, consult with any contracting party in respect of any matter for which it has not been possible to find a satisfactory solution through consultation under paragraph 1.

General Agreement on Tariffs and Trade, Oct. 30, 1947, art. x11:2 [hereinafter GATT]. 55 U.N.T.S. 194.

[36] *Tuna/Dolphin I, Panel Report*, 30 I.L.M., at 1598. Mexico requested consultations with the United States on the matter on November 5, 1990. *Id.* Consultations were held between the parties on December 19, 1990. Mexico's request in January for the establishment of the Panel was granted on February 6, 1991. *Id.* (noting that the following nations reserved their rights and requested to be heard by the Panel: Australia, Canada, Chile, Colombia, Costa Rica, the European Communities, India, Indonesia, Japan, Korea, New Zealand, Nicaragua, Norway, Peru, the Philippines, Senegal, Singapore, Tanzania, Thailand, Tunisia, and Venezuela).

[37] JOHN H. JACKSON, ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS § 12.3, 575-84 (3d ed. 1995) (outlining the issues confronting the Panel).

[38] *Tuna/Dolphin I, Panel Report*, 30 I.L.M., at 1600-01 (describing the embargo issued by the United States Customs Service against Mexico for the "importation of yellowfin tuna, and 'light-meat' tuna products which can contain yellowfin tuna, under specified Harmonized . . . tariff headings . . . unless the importer provides a declaration that, based on appropriate inquiry and the written evidence in his possession, no yellowfin tuna or tuna products in the shipment were harvested with purse-seines in the ETP by vessels from Mexico, Venezuela or Vanuatu."). Under the "Pelly Amendment" to the Fisherman's

"intermediary nations"[39] embargo provisions of the MMPA. The intermediary embargo prohibits imports of tuna products from nations who fail to certify that they have not imported tuna caught through use of purse seine methods from nations subject to the "primary nations" embargo or the direct ban provided under the Act.[40] Mexico asserted that the import bans imposed by the U.S. constituted an extraterritorial and unilateral attempt by the U.S. to impose domestic environmental policy in a manner inconsistent with GATT.[41]

Protective Act of 1967, 22 U.S.C. § 1978(a), the Secretary of Commerce must certify the embargo to the President, who may then prohibit the importation of tuna "for such duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade. *Id.* (quoting section 8(a) of the Fisherman's Protective Act of 1967).

[39] Intermediate nations are those who violate the MMPA indirectly, not by failing to satisfy the comparability standards of the U.S. themselves, but by importing tuna or tuna products from nations who do, thereby making it possible that those products would wash up on U.S. shores after processing. *See*, Spracker and Lundsgaard, *Dolphins and Tuna*, *supra* note 18, at 401 (noting that the term intermediary nations ban meant "blocking tuna imports from nations that imported tuna from nations subject to [a] direct ban."). This definition of "intermediary embargo was eventually codified in the 1988 Amendments to the MMPA and defined in Section 1362(5):

> [T]he term 'intermediary nation' means a nation that exports yellowfin tuna or yellowfin tuna products to the United States and that imports yellowfin tuna or yellowfin tuna products that are subject to a direct ban on importation into the United States pursuant to section 1371(a)(2)(B) of this title.

16 U.S.C. § 1362(5) (Supp. 1997). The countries labeled intermediary nations at the time of Mexico's complaint were Costa Rica, France, Italy, Japan, and Panama. *Tuna/Dolphin I, Panel Report*, 30 I.L.M. 1594, 1600 (1991).

[40] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1600. Section 1371(a)(2)(C) provides that the Secretary of Commerce "shall require the [G]overnment of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under this section within sixty days following the effective date of such importation to the United States." 16 U.S.C. § 1371 (a)(2)(C) (1991 amended by Supp. 1997). After six months from the time at which the intermediary nation has failed to submit such certification, the Secretary was required to notify the President (Secretary of the Treasury), who would apply an embargo pursuant to the Pelly Amendment. *Id.* Section 1371(a)(2)(C) has since been modified, but contains essentially the same requirements. 16 U.S.C. § 1372(a)(2)(C) (Supp. 1997).

[41] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1605 (discussing Mexico's argument that "[t]o accept that one contracting party might impose trade restrictions to conserve the resources of another contracting party would have the consequence of introducing the concept of extraterritoriality into the GATT, which would be extremely dangerous for all

1. GATT Issues Raised

Mexico alleged that the relevant provisions of the MMPA amounted to a "quantitative restriction" on their tuna products, prohibited by Article XI of GATT.[42] The U.S. countered that the embargo against Mexico was a permissible "internal regulation" and met the national treatment requirement under Article III of GATT.[43] Article III (4) and Ad Article III permit contracting parties to place regulations or internal taxes that are "collected or enforced in the case of the imported product at the time or point of importation," provided that such restrictions accord the importing country "treatment no less favorable than that accorded to like products" of domestic origin.[44]

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contracting parties."). Mexico further argued that "under the MMPA, the United States not only arrogated to itself [the] right of interference, but also the right of interference in trade between other contracting parties, by providing for an embargo of countries considered to be 'intermediary nations' simply because they continued to buy products which the United States had unilaterally decided should not be imported by itself or by any other country." *Id.*

[42] *Tuna/Dolphin I, Panel Report,* 30 I.L.M. at 1602 (1991) (discussing Mexico's argument that the exceptions to Article XI's proscription against quantitative restrictions on imports and exports of products). Article XI(1) of GATT provides:

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

GATT, art. x1(1).

[43] The U.S. did not argue that provisions of the MMPA fell within the exceptions to the general rule set forth in Article XI and listed in paragraph 2, but stated rather that the MMPA provisions were "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of yellowfin tuna harvested in the ETP with purse-seine nets, and fully consistent with Article III" of GATT. *Tuna/Dolphin I, Panel Report, 30 I.L.M.* at 1602.

[44] GATT, art. III para. 4, ad art. III (as amended and in force, 1994). Ad Article III specifically provides, in relevant part:

> Any internal tax or other internal charge, or any law, regulation or requirement [. . . affecting the internal sale, purchase, transportation, distribution or use of products . . .], which applies to an imported product and the like domestic product and is collected or enforced *in the case of the imported product at the time or point of importation*, is nevertheless to be regarded as an internal tax or other internal charge . . . (emphasis provided).

Id. This article sets forth what is referred to as the "National Treatment" principle: "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded *treatment no less favourable than that accorded to like*

The U.S. argued that the restrictions on Mexican tuna products were merely an enforcement at the time or point of importation of tuna products under the MMPA (an internal regulation).[45] The U.S. asserted that these restrictions were applied equally to both domestic and foreign products, thus satisfying the national treatment requirement of Article III (4). On the other hand, Article XI prohibits any contracting party from placing restrictions or prohibitions "on the importation of any products of the territory of any other contracting party."[46] Thus, Mexico argued that Article XI must be read separately from Article III and that the U.S. could not shirk its obligations under the former by asserting the latter.[47]

Relying on the interpretations of two previous panel reports[48] and on its own reading of Article III, the Panel concluded that contracting parties could impose "laws, regulations and requirements affecting the internal sale of products," but such parties could not attempt to impose similar restrictions on the processes used to obtain or to create the products.[49] Tuna taken by purse seine fishing methods are the same as tuna harvested by whatever techniques used by U.S. commercial fishing fleets to meet the MMPA's standards.[50] Since Article III applies only to tuna

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products of national origin . . . " *Id.* at art. III (4) (emphasis added).

[45] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1602 (describing the U.S.'s reliance on a prior Panel Report on Canada - Administration of the Foreign Investment Review Act, GATT B.I.S.D. (30th Supp.) at 140, which stated that measures subject to the provisions Article III were not to be considered in the context of Article XI or XIII).

[46] GATT, art. XI. For text of GATT, art. XI, *see supra* note 42.

[47] Spracker and Lundsgaard, *Dolphins and Tuna*, *supra* note 18, at 395. ("Mexico, not surprisingly, took the position that simply meeting the qualifications of Article III did not justify the import ban, since Article III and Article XI were not exclusive. Even if the import ban met the requirements of Article III, it could still be struck down as inconsistent with Article XI.").

[48] Panel Report on United States Taxes on Petroleum and Certain Imported Substances, June 17, 1987, GATT B.I.S.D. (34th Supp.) at 136 (1988); Panel Report on United States Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT B.I.S.D. (36th Supp.) at 345 (1990).

[49] *Tuna/Dolphin I, Panel Report*, 30 I.L.M., at 1618 (noting that "under the national treatment principle of Article III, contracting parties may apply border tax adjustments with regard to those taxes that are borne by products, but not for domestic taxes not directly levied on products (such as corporate income taxes)."). Hence, the import prohibition on tuna under the MMPA did not constitute an internal tax covered by Note Ad Article III. *Id.*

[50] Spracker and Lundsgaard, *Dolphins and Tuna*, *supra* note 18, at 396-97 (noting that in the "Panel's view, tuna harvested by purse seine was identical, as a product, to tuna harvested by any other method" of fishing). The Panel's interpretation of Article III, para. 4 rested on their previous panel holdings, which required "effective equality of opportunities for imported products in respect of the application of laws, regulations or requirements

products, and not to processes, the Panel concluded that the U.S. could not assert Ad Article III's internal regulation allowance as justification for the embargo against Mexico.[51]

The Panel noted that even had MMPA's tuna harvesting regulations been construed as a regulation on the sale of tuna as a product, the U.S. had not complied with Article III (4)'s national treatment mandate in a number of areas.[52] Most importantly, the MMPA's requirement that foreign vessels achieve incidental takings of dolphins comparable to domestic standards, does not affect tuna as a product.[53] Therefore, the U.S. was "oblige[d] . . . to [accord] treatment to Mexican tuna no less favorable" than U.S. tuna regardless of whether "the incidental taking of dolphins by Mexican vessels" corresponded to U.S. domestic standards.[54]

Having found Article III inapplicable, the Panel determined that the MMPA was also inconsistent with Article XI's prohibition against quantitative restrictions on

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affecting the sale, offering for sale, purchase, transportation, distribution or use of products, and that this standard had to be understood as applicable to each individual case of imported product." *Tuna/Dolphin I, Panel Report*, 30 I.L.M., at 1617 (citing previous panel reports, *supra* note 48).

[51] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1618 (1991). The Panel found that the U.S. embargo against Mexico "did not constitute internal regulations covered by the Note Ad Article III." *Id.* at 1618-19 (adding that the MMPA's provisions which set a yearly ceiling on the number of dolphins taken by domestic fishermen, but which also placed a retroactive and variable ceiling on actual dolphin taken by the foreign tuna producers set according to the number of dolphins taken by the domestic tuna fleet in the same time period raised some concern but was inapposite in light of their conclusions regarding Article III).

[52] *Id.* The Panel noted that the methods by which the NMFS determined compliance with the comparability requirements (highlighted in Earth Island Institute v. Mosbacher, 929 F.2d 1449 (9th Cir. 1991) and discussed *supra* note 19) discriminated against foreign vessels. *Id.* at 1618. ("certain aspects of the requirements could give rise to legitimate concern, in particular the MMPA provisions which set a prospective absolute yearly ceiling for the number of dolphins taken by domestic tuna producers in the ETP, but required that foreign tuna producers meet a retroactive and varying ceiling for each period based on actual dolphin taking by the domestic tuna fleet in the same time period.").

[53] *See* Spracker and Lundsgaard, *Dolphins and Tuna*, *supra* note 18, at 395 (noting that the Panel's primary concern was that Article II "only permits an importing country to regulate a product qua product" and does not allow the regulation of the process why the product is made).

[54] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1618 (pointing out that if the MMPA was actually regulating tuna products as such, the tuna embargoes were still violative of Article III because importing countries were not accorded national treatment when compared to domestic tuna products under Article III para. 4).

imports.[55] The Panel concluded that the primary and intermediary embargoes placed on imports of tuna products from Mexico was a quantitative restriction in violation of Article XI of GATT.[56]

The final protest asserted by Mexico pertained to § 1371(a)(2)(D) of the MMPA. That section provides that once a ban on the importation of yellowfin tuna or tuna products is issued it "shall be deemed . . . a certification" to extend import prohibitions for all Mexican fish products under Section 8 of the Pelly Amendment to the Fisherman's Protective Act.[57] The Pelly Amendment permits the President, at his discretion, to "direct the Secretary of the Treasury to ban the importation of all fish or wildlife products," from the country certified under § 1371.[58]

Mexico argued that the statutory provision was inconsistent with Article XI of GATT.[59] However, the Panel concluded that "legislation merely giving those executive authorities the power to act inconsistently with the General Agreement is not, in itself, inconsistent with the General Agreement."[60] Since the U.S. had not yet imposed such a plenary ban, and since the Act did not require that the President take such action, the Panel determined that the Pelly Amendment provision was not inconsistent with GATT.[61]

2. GATT's General Exceptions

The United States attempted to justify the import ban on Mexico by asserting

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[55] *Id.* ("The United States did not present to the Panel any arguments to support a different legal conclusion regarding Article XI.").

[56] *Id.*

[57] 16 U.S.C. §1371(a)(2)(D) (referring to the Pelly Amendment to the Fishermen's Protection Act of 1967, 22 U.S.C. §1978(a) (1988)). *See supra* note 38 and accompanying text (discussing the Pelly Amendment and the authority for imposing an embargo on Mexico's tuna products).

[58] Spracker and Lundsgaard, *Dolphins and Tuna*, *supra* note 18, at 391-402 (discussing the Pelly Amendment and the Panel's analysis).

[59] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1619.

[60] *Id.* (relying on two previous panel decisions to analyze the discretionary authority afforded to the President in deciding whether to implement the embargoes permitted by the Pelly Amendment) (citing panel reports on: (1) United States- Taxes on Petroleum and Certain Imported Substances, June 17, 1987, GATT B.I.S.D. (34th Supp.) at 136, 160-64, paras. 5.2.2, 5.2.9-10 (1988); EEC- Regulation on Imports of Parts and Components, GATT B.I.S.D. (37th Supp.) at 132, 198-99, paras. 5.25-5.26 (1991)).

[61] *Id.*; *see also* Skilton, *GATT and the Environment in Conflict*, *supra* note 6, at 470 ("as the Pelly Amendment does not require trade measures to be taken, it is not inconsistent with GATT.").

two exceptions provided under Article XX of GATT.[62] First, the U.S. argued that the prohibition on imports of tuna or tuna products were justified under Article XX(b) as a necessary measure, solely for the purpose of protecting dolphin life and health.[63] Second, the provisions of the MMPA were justified under Article XX(g)

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[62] Article XX provides, in relevant part, that:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> . . . .
>
> (b) necessary to protect human, animal, or plant life, or health;
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> . . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . . .

GATT, art. XX.

[63] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1619-20. Mexico's primary argument against the application of Article XX(b) outside the jurisdiction of the United States was that such measures were not necessary "because alternative means consistent with the General Agreement were available to it to protect dolphin lives or health, namely international co-operation between the countries concerned." *Id.* at 1619. The U.S.'s concern was based on the fact over 20 percent of the world's fisheries catch occurred in Latin America as of 1986. USITC, 1990, *supra* note 6, at 272 (noting also that Mexican tuna harvests reached record levels by 1988 and that the tuna industry in Latin America had shown a significant surge by the end of the 1980s).

The following table represents data taken by the Inter-American Tropical Tuna Commission (IATTC) illustrating that Mexico, Venezuela, and Ecuador were the leading Latin American tuna fishing nations at the time of the Panel dispute:

LATIN AMERICAN TUNA FISHING NATIONS (in short tons)

COUNTRY	1980	1985	1986	1987	1988
Mexico	36,043	96,805	125,047	117,256	136,212
Venezuela	2,369	32,972	46,185	51,070	57,046
Ecuador	20,504	38,705	46,708	41,149	45,441
Panama	11,255	not significant	not significant	not significant	not significant
Peru	944	not significant	not significant	1,596	not significant

Source: USITC, 1990, *supra* note 6, at 273.

because they were "primarily aimed at rendering effective restrictions on domestic production or consumption" of an exhaustible natural resource-- dolphins.[64]

a. Article XX(b)

Article XX(b) provides an exception for measures "necessary to protect human, animal or plant life or health," provided that such measures are not applied in an arbitrary, unjustifiable, or discriminatory manner.[65] The Panel addressed Mexico's arguments that Article XX(b) could not apply to measures undertaken outside the jurisdiction of the U.S. and that even if Article XX(b) did apply, the import prohibition was not "necessary" to protect dolphins.[66] The text of Article XX(b) did not indicate the extent of protection a contracting part could render outside its jurisdiction.[67]

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[64] *Tuna/Dolphin I, Panel Report*, 30 I.L.M., at 1620. The question arose over whether the U.S. was really concerned about the depletion of dolphins or whether they were more concerned over the increase in competition between Mexican tuna products and domestic tuna products. *See* USITC, 1990, *supra* note 6, at 279 (illustrating that the volume of frozen tuna exports from Mexico increased from 32,039 short tons to 92,594 short tons between 1985 and 1989, nearly a three-fold increase).

[65] GATT art. XX(b). *See supra* note 62, at art. XX (setting forth the complete text of Article XX and its concomitant requirement that the principles of the preamble be satisfied before a contracting party can assert one of the exceptions).

[66] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1619 (describing Mexico's assertion that alternatives to the intermediary and direct embargoes could come in the form of multilateral, international agreements).

[67] *Id.* at 1620; *see also* Pedrozo, *Unreasonable Extension, supra* note 14, at 101-02 (providing a comprehensive analysis of the reasonableness of the U.S.'s assertion of extraterritorial jurisdiction under the Restatement (Third) of the Foreign Relations Law of the United States). Article 38(1) of the International Court of Justice Statute (ICJ Statute) lists four sources of international law from which the U.S. could draw to substantiate its right to exert extraterritorial jurisdiction: (1) rules and principles set forth in treaties to which the contesting parties are members; (2) international custom, as evidence of a general practice accepted as law; (3) the general principles of law recognized by civilized nations; and (4) judicial decisions *inter se* (between the parties), i.e. not *erga omnes* (prior decisions between other parties) and scholarly works from the most highly qualified publicists of various nations. *Statute of the International Court of Justice*, 1983 U.N.Y.B. 1334, 1336, U.N. Sales No. E.86.I.1 (statute entered into force Oct. 24, 1945). These sources of law are listed in an implicit hierarchy, treaties being controlling if both contesting parties are members. Customary principles of international law are also a legitimate source of law. *See* The Paquete Habana, 175 U.S. 677 (1900) (examining the practices of several European Countries in determining that fishing vessels were exempt from capture as prizes of war as a customary principle of international law; and noting that duration of practice among states and *opinio juris* (consent to be bound by the practice) determined the existence of a

Referring to the drafting history of GATT and to a prior panel report indicating that the "necessary" requirements "refer to the trade measures requiring justification under Article XX(b), [and] not . . . to the life or health standard chosen by the contracting party," the Panel determined that a contracting party could pursue public policy goals that were inconsistent with GATT to the extent they were unavoidable.[68] Thus, the Panel read the exception narrowly based on the concern that otherwise, "each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate

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customary principle). Under what is known as the "effects doctrine," a state may proscribe conduct occurring outside its territory when there is a substantial effect on its territory as a customary principle of law. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(1)(c) (1986) [hereinafter RESTATEMENT (THIRD)]. However, this principle is conditioned on the exercise of extraterritorial jurisdiction being reasonable when considering some of the following factors set forth in §403(2) of the RESTATEMENT (THIRD):

> a. The extent to which the activity takes place within the regulating state, or has substantial, direct, and foreseeable effect upon or in the regulating state;
> b. The connections, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated, or between that state and those whom the law or regulation is designed to protect;
> c. The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.

Id. While no one factor is determinative, it is clear that the U.S. had a difficult time asserting that its exercise of extraterritorial jurisdiction was reasonable before the GATT Panel. *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1605 (addressing Mexico's argument that the U.S.'s obligations under GATT were determinative and Mexico's statement that "[t]o accept that one contracting party might impose trade restrictions to conserve resources of another contracting party would have the consequence of introducing the concept of extraterritoriality into the GATT, which would be extremely dangerous for all contracting parties.").

[68] *Tuna/Dolphin I, Panel Report*, 30 I.L.M. at 1605 (referring to the New York draft of the International Trade Organization (ITO) Charter and the Panel Report on "Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes," adopted 7 November 1990, B.I.S.D. 37S/200, 222-23, DS10/R, paras. 73-74). The Panel concluded that the Second Session of the Prepatory Committee in Geneva, who were partially responsible for drafting Article XX(b), perceived the exception as allowing for the use of sanitary regulations to "safeguard life or health of humans, animals or plant life within the jurisdiction of the importing country." *Id.* at 1620 (citing EPCT/A/PV/30/7-15). Measures to protect dolphins presented a problem according to the Panel, in linking the jurisdiction of the U.S. to the proviso. *See* Pedrozo, *Unreasonable Extension*, *supra* note 14, at 104 (discussing the unreasonableness of the U.S.'s extension of jurisdiction, especially when the use of purse seine fleets by U.S. fisherman had declined since the 1981 amendments to the MMPA).

without jeopardizing their rights under the General Agreement."[69]

As the party invoking the Article XX exception, the U.S. had the burden of showing that it had "exhausted all options reasonably available to it to pursue its dolphin protection objectives" by way of international agreements consistent with GATT.[70] Ignoring the fact that the U.S. had attempted to establish an international agreement to resolve the depletion of dolphin populations in the ETP for nearly forty years[71], the Panel concluded that the measure chosen by the U.S. was not

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[69] *Tuna/Dolphin I, Panel Report,* 30 I.L.M., at 1620. It should also be noted that the Panel did not find the MMPA's tuna labeling scheme GATT violative. *Id.* at 1616 (reasoning that "the use of the label 'Dolphin Safe' is not a requirement but is voluntary."). On May 28, 1991, the Dolphin Protection Consumer Information Act (DPCIA) took effect. 16 U.S.C. § 1385 (Supp. 1977). Section 1385 (d)(1) incorporates the DPCIA's labeling requirements into the MMPA and specifically provides in part that:

> (1) It is a violation of section 5 of the Federal Trade Commission Act for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to include on the label of that product the term "Dolphin Safe" or any other term or symbol that falsely claims or suggests that the tuna contained in the product was harvested using a method of fishing that is not harmful to dolphins if the product contains--
> (A) tuna harvested on the high seas by a vessel engaged in driftnet fishing; or
> (B) tuna harvested in the eastern tropical Pacific Ocean by a vessel using purse seine nets which do not meet the requirements for being considered dolphin safe
> . . . .

16 U.S.C. § 1385(d)(1)(A-B) (Supp. 1997). The labeling provisions contained within the MMPA did not trouble the Panel because whether or not importers of tuna products chose to place a "Dolphin Safe" label was entirely up to the producer. *See Borderless Believability (speech by Ketchum Public Relations Worldwide CEO David R. Drobois),* Feb. 15, 1997 VITAL SPEECHES 281, *available in* 1997 WL 10024365 (pages unavailable online)(describing how Star-Kist, the world's largest tuna producer, gained significant advantages by adopting a "Dolphin Safe" labeling policy, not only in the U.S., but through its subsidiaries in Australia and Europe).

[70] *Tuna/Dolphin I, Panel Report,* 30 I.L.M. at 1620 (noting that the "negotiation of international cooperative arrangements . . . would seem to be desirable in view of the fact that dolphins" are a highly migratory species). The panel also determined that tuna product ban was arbitrary and unpredictable. *Id.* The quota limit under 16 U.S.C. § 1371 for foreign imports of tuna products was linked to the taking rate of U.S. fisherman during the same period and applied retroactively. *Id.* (stating that "the Mexican authorities could not know whether, at a given point of time, their policies conformed to the United States' dolphin protection standards.").

[71] Steve Charnovitz, *Dolphins and Tuna: Analysis of the Second GATT Panel Report,* 24 ENVT'L L. REP. 10,567, 10,570-71 (1994) [hereinafter Charnovitz, *Dolphins*] (discussing earlier international trade conferences aimed at marine mammal conservation). For example,

necessary within the meaning of Article XX(b).[72] The effect of the Panel's decision meant that a contracting party could only invoke measures to protect health and safety within its own jurisdiction and not extraterritorially.

b. Article XX(g)

Consistent with the fears expressed with allowing an extraterritorial reading of Article XX(b), the Panel construed Article XX(g) to permit a contracting party to take "trade measures primarily aimed at rendering effective restrictions on production or consumption within their jurisdiction."[73] However, the embargo placed on Mexico was aimed at conserving dolphins as an exhaustible resource outside of U.S. jurisdiction. Despite the absence of language limiting its jurisdictional scope, the Panel concluded that the import ban on Mexican tuna products could not be justified under Article XX(g).[74]

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the Inter-American Tropical Tuna Commission (IATTC) was a bilateral fishing agreement between Costa Rica and the U.S. established in 1950. Convention for the Establishment of Inter-American Tropical Tuna Commission, May 31, 1949, U.S. - Costa Rica, 1 U.S.T. 230 (other member states now include: Panama, Ecuador, Canada, Japan, France and Nicaragua-Mexico and Costa Rica have withdrawn their membership). However, the IATTC had little effect until 1976 when reported its intention to implement the following goals:

(1) [To] strive to maintain a high level of tuna production and
(2) also to maintain porpoise stocks at or above levels that assure their survival in perpetuity,
(3) with every reasonable effort being made to avoid needless or careless killing of porpoise.

PEDROZO, UNREASONABLE EXTENSION, *supra* note 14, at 95 (quoting U.S. INT'L TRADE COMM'N, PUB. NO. 2547, TUNA: CURRENT ISSUES AFFECTING THE U.S. INDUSTRY, REPORT TO THE SENATE COMMITTEE OF FINANCE 3-2 (1992)). This statement of policy established a monitoring mechanism for fishing practices and performance of fishing fleets in the ETP. *Id.* Not until 1992, was the IATTC successful in establishing "the first ever multilateral agreement to protect dolphins in the ETP. *Id.* at 96 (discussing the La Jolla Conference held in California, which finally gave some teeth to the IATTC program by gaining a commitment from various nations to firmly reduce dolphin mortality by 80 percent between 1993 and 1999).

[72] *Tuna/Dolphin I, Panel Report,* 30 I.L.M. at 1620.

[73] *Id.* at 1621 (the Panel repeated its slippery slope argument used to justify its finding with regard to Article XX(b): If the U.S. interpretation of Article XX(g) were accepted, "each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.").

[74] *Id.* (adding, however, that it made no finding as to whether the U.S. measures could be applied extraterritorially if they met Article XX(g)'s requirement that they be "primarily aimed at" dolphin conservation); *see also* Spracker and Lundsgaard, *Dolphins and Tuna,*

3. Conclusion

Tuna/Dolphin I represented the first challenge to the MMPA's trade provisions at an international level.[75] Although the Panel's decision was not binding[76], its recommendation that the U.S. bring its conservation measures into conformity with its obligations under GATT caused a stir among environmental groups and the Bush Administration.[77] Clearly these pressures and the interests in achieving membership into the North American Free Trade Agreement (NAFTA) are what led Mexico to withdraw its GATT complaint, rendering the Panel decision unadopted.[78] The Panel's assurance that their decision would not affect "the rights of individual contracting parties to pursue their internal environmental policies and to cooperate

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supra note 18, at 398-99 (discussing the absence of explicit language limiting the scope of Article XX(g) and stating that "[s]ince the import ban was designed to conserve an exhaustible natural resource outside of the jurisdiction of the United States, specifically dolphin stocks in the ETP, it could not be justified under Article XX(g)).

[75] *See* Yechout, *In the Wake of Tuna II, supra* note 5, at 253 (noting that until 1990 no embargoes had been placed on foreign tuna products).

[76] *But see* Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Agreement Establishing the World Trade Organization), April 15, 1994, art. 16, para. 4, art. 17, para. 14, *reprinted in* 33 I.L.M. 1226, 1235, 1237 (eliminating the prior practice under GATT, which permitted countries to block adoption of panel decisions against them). Article 17, para. 14 specifically provides:

> An Appellate Body report shall be adopted by the DSB [Dispute Settlement Body] and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.

Id. at 1237.

[77] *See* Steve Charnovitz, *Green Roots, Bad Pruning: GATT Rules and Their Application to Environmental Trade Measures*, 7 TUL. ENVTL. L.J. 299, 302 (1994) [hereinafter Charnovitz, *Green Roots*] ("the decision startled American environmental organizations, making them deeply concerned when they realized that the panel's logic could be applied to invalidate numerous other environmental laws . . . . Once it became clear how troublesome the GATT panel's decision was, the Bush Administration convinced Mexico not to seek adoption of the panel report within the GATT."). Marianne Lavelle, *Free Trade v. Law*, NAT'L L.J., Mar. 29, 1993, 1 [hereinafter Lavelle, *Free Trade*] (including the Tuna/Dolphin decisions as the "seminal trade/environmental case, prompted in part by a domestic conflict between U.S. environmentalists and the Reagan/Bush administration.").

[78] Lavelle, *Free Trade, supra* note 77, at 38. ("Since Mexico's top international economic priority was the negotiation of NAFTA, Mexico was willing to suspend its GATT complaint in the interest of securing environmentalist support for NAFTA."). *Id.* at 1 (noting that the "tuna/dolphin ruling was never finalized because both Mexico and the United States, fearing the political reaction at home while in the throes of bilateral trade negotiations, quickly worked out a settlement.").

with one another in harmonizing such policies" did not erase memories of futile attempts to expand internal environmental policies.[79]

Nevertheless, the Bush Administration agreed to lift the MMPA embargo against any country that agreed to suspend purse seine fishing for five years and supported Congress' enactment of the International Dolphin Conservation Act (IDCA) in 1992.[80] The IDCA amended the MMPA by adding a section that authorizes the

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[79] *Tuna/Dolphin I, Panel Report,* 30 I.L.M. 1594, 1622 (1991); *see also* Daniel P. Blank, Note, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment,* 15 STAN. ENVTL. L.J. 61, 68-72 (1996) (discussing the diminishing effectiveness of International Conservation Programs in the light of the 1994 Taiwan case involving the Convention on International Trade in Endangered Species (CITES)). The Panel referred to three other cases in which states attempted to impose conservation measures that were unsuccessful due to pre-existing trade obligations: (1) European Communities v. Denmark, Case 302/86, ECR 4607 (1988), where the European Court of Justice, applying the EC Treaty rule similar to the GATT rule that "necessary" measures are those which prove the "least restrictive," objected to a Danish law that limited the sale of non-returnable beer containers; (2) In the Matter of Canada's Landing Requirement for Pacific Coast Salmon and Herring, Secretariat File No. CDA-89-1807 (1989), where the U.S./Canada Free Trade Act Panel rejected, as non-tariff trade barrier, Canada's regulation requiring that all salmon and herring caught in Canadian waters be brought ashore before exportation; and (3) Thailand- Restrictions on Importation of and Internal Taxes on Cigarettes, GATT Doc. DS10/R (1990), where a GATT Panel declared that a domestic ban on imported cigarettes was not a "necessary" health measure. Lavelle, *Free Trade, supra* note 77, at 38.

[80] Yechout, *In the Wake of Tuna II, supra* note 5, at 259 (discussing the debate within the Bush Administration that to the enactment of the International Dolphin Conservation Act of 1992, 16 U.S.C. §§ 1411-1418). The result of the Panel report created a debate in Congress between supporters of two different bills calling for an amendment to the MMPA. *See* Perkins, *Does Might Make Right, supra* note 9, at 236-40 (providing an excellent analysis of the events leading up to the enactment of the IDCA and its resulting provisions). From the Senate, the "Breaux bill" was introduced to implement the La Jolla Agreement established in relation to the IATTC, with the objective of:

> (1) progressively reducing dolphin mortality in the eastern Pacific Ocean (EPO) fishery to levels approaching zero through the setting of annual limits and
> (2), with a goal of eliminating dolphin mortality in this fishery, seeking ecologically sound means of capturing large yellowfin tunas not in association with dolphins while maintaining the populations of yellowfin tuna in the EPO at a level which will permit maximum sustained catches year after year, and to limit and, if possible, eliminate the mortality of dolphins in the fishery of the EPO [to a mortality percentage of less than 8 by 1999].

Agreement for the Reduction of Dolphin Mortality in the Eastern Pacific Ocean (EPO), June, 1992, done at La Jolla, Calif., *reprinted in* 33 I.L.M. 936, 938 (1992); *see also* Perkins,

Secretary of State to enter into international agreements to prohibit certain tuna harvesting practices.[81] Although the IDCA attempted to harmonize the conflicts between conservation efforts and GATT obligations by encouraging multilateral negotiations, the European Economic Community and the Netherlands did not find this an adequate means of obtaining relief.[82]

B. Tuna/Dolphin II, 1994

In June of 1992, the European Economic Community (EEC) requested the Contracting Parties to establish a dispute panel pursuant to Article XXII: 2 of GATT.[83] Soon after, the Netherlands requested to be joined in the EEC's

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Does Might Make Right, supra note 9, at 237 (discussing Senator Breaux of Louisiana's proposed amendment to the MMPA, which would act to eliminate rather than merely reduce dolphin mortality.).

From the House of Representatives, Congressman Studds of Massachusetts proposed an amendment to the MMPA which was eventually adopted by Congress as the IDCA. 138 CONG. REC. H9064-02 (1992); 138 CONG. REC. S17840-05 (1992) (House and Senate hearings finalizing the essence of the IDCA). The result of the Congressional debate led to the addition of Subchapter IV to the MMPA. 16 U.S.C. § 1411-1418. (1992) (discussed *infra* note 81 and accompanying text.).

[81] 16 U.S.C. § 1412(a) (1994). The incentive offered by the IDCA, i.e. the lifting of any tuna embargo for any state agreeing to comply with the moratorium, directly stems from the tuna dolphin dispute. *See* 138 CONG. REC. S17840-05, S17841 (1992) (declaring that the timing of the IDCA was important "because current provisions of the MMPA have resulted in an embargo of tuna and tuna products from Mexico and Venezuela, two of the most prominent foreign fleets in the ETP," and the MMPA had failed to fully achieve its goal of "ending the needless destruction of marine mammals."). The lifting of the embargo would have its price, as any state seeking to take advantage of the immunity from the embargo would have to comply with certification requirements stating that they had statistically reduced their mortality levels from 1991 to a significant degree. 16 U.S.C. § 1415(a) (Supp. 1997).

[82] *See* General Agreements on Tariffs and Trade Dispute Settlement Panel, United States Restrictions on Imports of Tuna (1994), *reprinted in* 33 I.L.M. 839 (1994) [hereinafter *Tuna/Dolphin II, Panel Report*]; *see also* USITC, 1990, *supra* note 6, at 188-189 (noting that "Europe is second only to the U.S. market in terms of canned tuna consumption," leading to the conclusion that an intermediary embargo imposed by the U.S. against the import of tuna products would not be consistent with the EC's interests, despite the IDCA amendments).

[83] *Tuna/Dolphin II, Panel Report*, 33 I.L.M. at 844. *See supra* notes 42-43 and accompanying text (discussing the consultation procedure under Article XXII of GATT).

complaint.[84] Once again the subject of the dispute was the U.S.'s restrictions on the importation of tuna products. Although Mexico satisfied its dispute with the U.S. using a resolution-through-negotiation approach, the co-complainants before the Tuna/Dolphin II Panel did not find this to be an amenable alternative to outright elimination of the intermediary nation embargoes.[85]

After the parties concluded consultations regarding the new IDCA amendments to the MMPA, the Panel resumed its proceedings and addressed those provisions relevant to the intermediary embargoes under the MMPA.[86] Similar to Mexico's

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[84] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 844. (indicating that both the Netherlands and the EEC engaged in consultations with the U.S. pursuant to Article XXIII: 2). Following the EEC's lead, the Netherlands requested a panel to resolve its dispute with the U.S. on July 14, 1992. *Id.* Spain and France are the principal harvesting nations in the European Community (EC). USITC, 1990, *supra* note 6, at 178. However, most of their yellowfin tuna harvesting operations using purse seine vessels occur in the western Indian Ocean and not the ETP. *Id.* at 179. Hence, of primary concern to most of the EEC, including the Netherlands, was the intermediary embargo imposed by the U.S. against the imports of tuna from nations who permit the use of purse seine nets to catch tuna. *Tuna/Dolphin II, Panel Report,* 33 I.L.M., at 849 (discussing the MMPA's requirement that any state identified as an intermediary nation must certify that it had barred the import of tuna from any nation that was barred from directly importing tuna into the U.S.). The following table illustrates the major European importers of canned tuna between 1985-1989:

CANNED TUNA: EUROPEAN IMPORTS, 1985-1989 (in thousands of metric tons)

MARKET	1985	1986	1987	1988	1989
United Kingdom	34	33	32	44	61
France	22	34	44	51	45
West Germany	18	24	29	26	30
Netherlands	2	3	5	5	6
TOTAL: EC	87	110	133	150	166

Source: USITC, 1990, *supra* note 6 (also indicating that the Netherlands exported only a negligible amount of tuna products during this time period, which raises a question of how negatively they were impacted by the prospect of an MMPA embargo).

[85] *See* Yechout, *In the Wake of Tuna II, supra* note 5, at 263 (discussing the EU and the Netherlands complaint before the GATT Panel).

[86] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 845 (noting that the EEC requested a pause in the proceedings on October 12, 1992, followed by the Netherlands similar request on October 30, 1992, which was granted by the Chairman of the Panel on November 16,

request in Tuna/Dolphin I, the EEC and the Netherlands requested the Panel to recommend that the U.S. amend the MMPA to bring the Act into conformity with its obligations under GATT.[87]

First, the co-complainants asked the Panel to find that the "intermediary nation embargo" provisions under § 1371(a)(2)(C) of the MMPA violated Article XI of GATT and did not qualify as an internal regulation under Article III and Ad Article III of the trade agreement.[88] Second, the Panel was asked to make the same findings with regard to the MMPA's "primary nation embargo" provisions and the recent amendment added by the IDCA.[89] Finally, the Panel was urged to declare that the exceptions under Article XX of GATT were inapplicable to measures taken by a contracting member outside its jurisdiction.[90]

1992). The disputing parties agreed that certain amendments to the MMPA made by the IDCPA and by the High Seas Driftnet Fisheries Enforcement Act "could be considered in the course of the Panel proceeding." *Id.* The specific provision of the IDCA to be considered by the Panel was the new Section 305 of the MMPA, added by Section 2(a) of the IDCA. *Id*; *see also supra* notes 80, 81, and accompanying text (discussing the IDCA amendments to the MMPA).

[87] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 850. The United States requested that the Panel find that it was not possible to determine whether the embargos imposed pursuant to Section 305(a) of the MMPA in the future would be consistent with GATT or whether they fell within in Article XX's exceptions under GATT, "since these measures would be imposed in the context of a specific agreement between sovereigns . . . ." *Id.* at 850-51 (referring to the La Jolla Agreement to the IATTC (*see supra* note 80 and accompanying text (discussing the La Jolla Agreement)).

[88] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 850. Specifically the EEC and the Netherlands requested the Panel to:

> find that the import prohibitions on tuna and tuna products imposed pursuant to Section 101(a)(2)(C) of the Marine Mammal Protection Act (the 'intermediary nation embargo') were contrary to Article XI of the General Agreement, did not qualify as a border adjustment under Article III and the relevant not to that Article, and was not covered by any of the exceptions under Article XX.

Id.

[89] *Id.* Specifically the co-complainants requested the Panel to:

> find that the import prohibitions on tuna and tuna products imposed pursuant to Section 101 (a)(2) and Section 305 (a)(1) and (2) of the Marine Mammal Protection Act (the 'primary nation embargo') were contrary to Article XI of the General Agreement, did not qualify as a border adjustment under Article III, and was not covered by any of the exceptions of Article XX.

Id.

[90] *Id.* at 851 (referring to the co-complainants argument that the border measure "was merely a convenient way of enforcing an internal law . . . ."). The issue of extraterritorial application of environmental measures was the essence of both the Tuna/Dolphin disputes.

1. GATT Issues Raised

The Tuna/Dolphin II Panel applied the same analysis of Article III and Article XI as was applied in Tuna/Dolphin I. The Panel declared that the intermediary nation embargo imposed by the U.S. under the MMPA was not a justifiable measure "relating to the enforcement at the time or point of importation of an internal law, regulation or requirement that applied equally to the imported product and the like domestic product" under Article III of GATT.[91] Thus, the intermediary embargo constituted an impermissible quantitative restriction under Article XI:1.[92]

Although neither the EEC nor the Netherlands were affected by the primary nation embargo provisions at the time of the dispute, the Panel concluded that the U.S. left no discretion to the executive charged with imposing such a measure.[93]

See Kevin C. Kennedy, *Reforming U.S. Trade Policy to Protect the Global Environment: A Multilateral Approach*, 18 HARV. ENVTL. L. REV. 185, 203-4, 227 (1994) [hereinafter Kennedy, *A Multilateral Approach*] (discussing the problems with unilateral trade sanctions and efforts to regulate the global environment under the U.S.'s "holier than thou" approach).

[91] *Tuna/Dolphin II, Panel Report*, 33 I.L.M. at 889 (adding that the embargoes were a quantitative restriction in violation of Article XI: 1); *see also supra* Part II, Section A (1) (discussing Article III and Article XI of GATT in *Tuna/Dolphin I*).

[92] *Tuna/Dolphin II, Panel Report*, 33 I.L.M. at 889 (noting that the U.S. did not dispute the claims of the EU and the Netherlands, but merely claimed that they bore the burden of proving that import restrictions were a quantitative restriction). *Compare* Canada-Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies: Panel Report, GATT B.I.S.D. (39th Supp.) at 27 (1993) (also the subject of a previous GATT Panel report in 1988 stemming from a complaint brought by the European Union). In that case, the Heileman Brewing Company and the U.S. alleged, in part, that Canada had violated the national treatment principle of Article III:4 of GATT by imposing an environmental tax on non-refillable alcohol containers. *See* Lisa Crosby, Note, *Green Beer: When is an Environmental Measure a Disguised Restriction on International Trade?*, 7 GEO. INT'L ENVTL. L. REV. 537, 538-41 (analyzing the GATT panel decision and section 302(a) of the Trade Act of 1974 under which the U.S. brought its claim as well). The essence of the complaint was that Canada's provincial liquor boards permitted their domestic brewers to "deliver beer directly to the point of sale while requiring foreign beer distributors to ship to the liquor boards, who in turn delivered the product to retail outlets." *Id.* at 540 (noting that the U.S. was not complaining of the tax itself only the discriminatory delivery system). The GATT Panel held that the delivery system was inconsistent with Article III:4, since it required of foreign beer distributors something not required of domestic beer distributors. *Id.* at 541.

[93] *Tuna/Dolphin II, Panel Report*, 33 I.L.M., at 889 (discussing two previous panel decisions holding that "legislation requiring the executive to act contrary to obligations under the General Agreement was inconsistent with the General Agreement, whether or not the legislation had actually been applied in a particular case.") (citing Reports of the panels

This left open the possibility that the co-complainants would be subjected to the embargo should they fail to meet the standards required under the MMPA.[94] For that reason, the Panel found that the primary embargo violated Article XI:1 as well.

2. GATT's General Exceptions

Once again the U.S. argued that even if both the primary and intermediary nation embargoes were inconsistent with Articles III and XI, the measures fell within GATT's General Exception provisions under Article XX.[95] The U.S. asserted that the MMPA could be justified under Articles XX(b), XX(g), and XX(d).[96] Although the Panel eventually arrived at the same conclusion as the Tuna/Dolphin I Panel, its analysis was quite different and may have opened the door for contracting members of GATT to legitimately promote conservation efforts extraterritorially.[97]

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on the United States- Taxes on Petroleum and Certain Imported Substances, June 17, 1987, GATT B.I.S.D. (34th Supp.) at 136 (1988); EEC- Regulation on Imports of Parts and Components, May 16, 1990, GATT B.I.S.D. (37th Supp.) at 132 (1991).

[94] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 889 (rejecting the United States' argument that the co-complainants essentially had no standing to challenge the primary and secondary embargoes unless they had, in fact, been affected themselves).

[95] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 852. *Compare with supra* notes 62-63 and accompanying text (addressing Article XX of GATT and the exceptions discussed in Tuna/Dolphin I).

[96] *See* GATT art. XX(b),(g),(d). The text of Articles XX(b) and XX(g) of GATT is set forth *supra* note 62. Article XX(d) provides:

> [nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:] necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

GATT 194, art. XX(d), as amended (1994).

[97] JACKSON, *supra* note 37, at § 12.3, pp. 584. While the Panel recognized that the nations could impose extraterritorial measures, it was also careful to note that GATT would not allow unilateral boycotts as a means of achieving domestic policy goals. *See id.* (citing *Tuna/Dolphin II, Panel Report,* 33 I.L.M. 839 (1994), and comparing the United Nations Conference on the Environment and Development's Rio Declaration on Environment and Development, which states in Principle 12 that "[e]nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on international consensus." 31 I.L.M. at 878).

a. Article XX(g)

In contrast to Tuna/Dolphin I, the Panel first addressed the applicability of Article XX(g) as justification for the U.S. trade embargoes. The Panel read Article XX(g) to require a three prong analysis. First, the Panel considered whether the policies asserted by the U.S. for justification of its primary and intermediary nation embargoes were consistent with Article XX(g)'s allowance for measures "to conserve exhaustible natural resources."[98] The fact that dolphin populations could potentially be exhausted regardless of whether their populations were presently depleted, was enough to satisfy the Panel that the MMPA's program to conserve dolphins was a policy to conserve an exhaustible resource.[99]

Both the EEC and the Netherlands argued that even if dolphins were considered an exhaustible resource, the measures taken to conserve them could not be applied extraterritorially.[100] Like the Tuna/Dolphin I panel, this Panel stated that neither Article XX(g), nor any other provisions of GATT specifically limited the location of the exhaustible resource that could be conserved.[101] However, the Panel found that other provisions in Article XX and in GATT itself did not bar measures taken

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[98] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 890 (addressing the U.S.'s argument that the extraterritorial measures taken under the MMPA related to the conservation of dolphins as an exhaustible natural resource and that such measures were taken in "conjunction with restrictions on domestic production and consumption" as required by Article XX(g) of GATT).

[99] *Id.* at 891; *see also* Pedrozo, *Unreasonable Extension, supra* note 14, at 110 (emphasizing through analysis of data on dolphin mortality in 1991 that "dolphin populations in the ETP are not endangered by current purse seine fishing practices."). However, this factor did not concern the GATT Panel in 1994. *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 891. The Panel, finding "that dolphin stocks could potentially be exhausted, and that the basis of a policy to conserve them did not depend on whether at present their stocks were depleted, accepted that a policy to conserve dolphins was a policy to conserve an exhaustible natural resource." *Id.*

[100] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 891 (noting the co-complainants interpretation of Article XX(g), which went beyond the strict reading of the text and centered around the object and purpose of GATT as a whole).

[101] *Id.* at 891-92. *But see* Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development,* 91 AM. J. INT'L L. 231, 238 (1997) [hereinafter Steinberg, *EU, NAFTA, AND WTO*] (interpreting the GATT/WTO's position on extraterritorial environmental activity as adverse to restrictions on imports of goods are based on one nation's view of what is environmentally unsound).

outside of contracting members' territorial jurisdiction.[102] In fact, under general international law "states are not in principle barred from regulating the conduct of their nationals" with respect to natural resources outside their territory.[103] Thus, for the first time, a GATT panel found that Article XX(g) placed no limits on extraterritorial measures to conserve natural resources.[104]

Next, the Panel considered whether the MMPA's prohibitions on foreign tuna products were made "in conjunction" with restrictions on domestic products and whether these measures were "related to" the conservation of an exhaustible natural resource. The term "related to" was defined as "primarily aimed at the conservation of resources" by a previous panel.[105] The Panel noted that the intermediary embargo encompassed the import of tuna products from such countries whether or not the tuna was harvested in a manner that was in fact harmful to dolphins.[106] Therefore, the intermediary nation embargo "could not, by itself, further the United States conservation objectives"- protecting dolphins.[107] Similarly, the primary nation embargo permitted subjected countries to harvest tuna in a manner that was harmful to dolphins so long as their practices and policies were comparable to U.S. standards.[108]

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[102] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 891-92 (identifying, as an example, Article XX(e) which relates to a GATT exception for prison labor and which clearly was not intended to apply only to measures imposed outside the territorial jurisdiction of the party taking the measure).

[103] *Id.* at 892.

[104] Yechout, *In the Wake of Tuna II, supra* note 5, at 264-65 ("the Tuna II panel explicitly rejected the Tuna I panel's conclusion that extrajurisdictional measures were contrary to the GATT.").

[105] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 893 (citing, Canada -- Measures Affecting the Exports of Unprocessed Herring and Salmon, March 22, 1988, GATT B.I.S.D. (35th Supp.) at 98 (1989) ("the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purpose but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhaustive natural resources.") (internal quotations omitted).

[106] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 893. *See* Peter V. Michaud, Note, *Caught in a Trap: The European Union Leghold Trap Debate*, 6 MINN. J. GLOBAL TRADE 355, 370-72 (1997) [hereinafter Michaud, *Caught in a Trap*] (describing the Panel's conclusion that "related to" and "in conjunction with" meant "primarily aimed at" in the context of Article XX(g)).

[107] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 893-94.

[108] *Id.* (describing it another way the Panel noted: "measures taken under the primary nation embargo prohibited imports from a country of any tuna, whether or not the particular tuna was harvested in a way that harmed or could harm dolphins, as long as the country's

The Panel concluded that both the primary and intermediary nation embargoes could only accomplish their protection objectives by forcing other countries to change their own domestic policies in accordance with the policies of the U.S.[109] GATT simply does not permit contracting parties to impose trade embargoes to effect such changes. Accordingly, the Panel found the preamble to Article XX- the final prong of its analysis- inapposite.[110]

b. Article XX(b)

Consistent with its analysis of Article XX(g), the Panel determined that Article XX(b) required a three prong analysis. The first prong demanded a determination of whether the policies underlying the MMPA fell within the exception's policies of protecting "human, animal or plant life or health."[111] The EEC argued that the exception could not be invoked to justify measures taken outside the territorial jurisdiction of the party asserting the protective measures.[112] Following the reasoning it employed with respect to Article XX(g), the Panel declared that neither the language of Article XX(b), nor general principles of international law barred a state from the extraterritorial application of measures to protect "persons, animals, plants and natural resources."[113]

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tuna harvesting practices and policies were not comparable to those of the United States.").

[109] *Id.* at 894 ("both the primary and intermediary nation embargoes on tuna implemented by the United States were taken so as to force other countries to change their policies with respect to persons and things within their own jurisdiction, since the embargoes required such changes in order to have any effect on the conservation of dolphins.").

[110] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 891 (quoting GATT, art. XX.). *See supra* note 62 and accompanying text (outlining the text of Article XX's preamble and its subsequent exceptions); *see also Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 894 (noting that the "long-standing practice of panels has . . . been to interpret [Article XX] narrowly," and expressing a fear that to interpret Article XX broadly would be to undermine the efficacy of GATT as a multilateral agreement).

[111] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 895. *See* David A. Wirth, *A Matchmaker's Challenge: Marrying International Law and American Environmental Law*, 32 VA. J. INT'L L. 377, 406-9 (1992) (analyzing the United States' statutory scheme for controlling contaminants in food and noting that "the exceptions in the GATT for trade measures directed at the protection of animal life or health or the conservation of natural resources must be narrowly construed.").

[112] *Tuna Dolphin II, Panel Report,* 33 I.L.M. at 896 (noting, that the parties agreed that the protection of dolphins fell within the policies of Article XX(b), but that the co-complainants did not agree that the U.S. had a right to pursue its policies extraterritorially).

[113] *Id.* at 892 (recalling its finding that "[a] state may in particular regulate the conduct of its fisherman, or of vessels having its nationality or any fisherman on these vessels, with respect to fish located in the high seas."); *see also* RESTATEMENT THIRD, *supra* note 67 and

The second prong required the Panel to determine whether the primary and secondary embargoes were measures " 'necessary' to protect the human, animal or plant life or health." The Panel replicated its analysis and conclusion under Article XX(g), reasoning that the MMPA could not directly promote its objectives unless the internal policies of sanctioned nations resembled those of the U.S.[114] Finally, Article XX(b) required a determination as to whether the requirements of Article XX's preamble had been met. Again, the Panel refused to consider the third requirement of the exception since the U.S. had not satisfied the condition that its protective measures were "necessary" under Article XX(b).[115]

c. Article XX(d)

The U.S. attempted to further justify its intermediary nation embargo by invoking Article XX(d). This exception provides that a nation may take measures "necessary to secure compliance with laws or regulations which are not inconsistent with" other GATT provisions.[116] Referring to its finding that the primary nation embargo was inconsistent with Article XI:1, the Panel concluded that the intermediary nation embargo could not be justified under the explicit language of Article XX(d).[117] Thus, having declared that the MMPA was inconsistent with GATT, the Panel also found that the Act could not be saved by any of the exceptions provided under Article XX.

3. Conclusion

Although the Tuna/Dolphin II Panel took a different path through virtually an identical jungle, it arrived at the same conclusion as the Tuna/Dolphin I Panel. The

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accompanying text (discussing customary international law and the "effects doctrine" permitting, in certain cases, the exercise of extraterritorial jurisdiction).

[114] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 897-98; *see also* Michaud, *Caught in a Trap, supra* note 106, at 372-73 (discussing the EU's 1991 regulation prohibiting the use of leghold traps or trapping methods that do not meet international trapping standards) (citing Council Regulation 3254/91 Prohibiting the Use of Leghold Traps in the Community and the Introduction Into the Community of Pelts and Manufactured Goods of Certain Wild Animal Species Originating in Countries Which Catch Them By Means of Leghold Traps or Trapping Methods which Do Not Meet International Humane Trapping Standards, 1991 O.J. (L 308) 1). The EU's leghold trap regulation would seem to run into conflict with GATT as well, but might be justified by a showing that a ban is necessary for the protection of animal health. *Id.*

[115] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 897 (reasoning that it would render the objectives of GATT "seriously impaired.").

[116] GATT, art. XX(d). *See supra* note 96 (outlining the text of Article XX(d)).

[117] *Tuna/Dolphin II, Panel Report,* 33 I.L.M. at 898.

basic theme throughout both of these decisions was that unilateral actions attempting to impose environmental policy measures on other nations are not compatible with GATT.[118] However, the Panel recognized dolphin conservation as a legitimate measure to conserve an exhaustible resource under GATT and found that such measures could be applied extraterritorially.[119] Thus, the U.S. could bring the MMPA within the auspices of the global-trade agenda using a multilateral approach to environmental conservation.[120]

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[118] Elliot B. Staffin, *Trade Barrier or Trade Boon? A Critical Evaluation of Environmental Labeling and its Role in the 'Greening' of World Trade*, 21 COLUM. J. ENVTL. L. 205, 253 (1996) [hereinafter Staffin, *Trade Barrier or Trade Boon?*] ("as currently interpreted, GATT simply will not countenance the unilateral attempt by one country to impose its environmental or conservation PPM [Product or Production] laws on another through use of a mandatory labeling scheme that enforces an import ban."). Staffin provides an excellent overview of the dolphin labeling systems of the MMPA, the Dolphin Protection Information Act, and the Earth Trust's (a non-profit wildlife conservation group) "Flipper Seal of Approval Scheme," which provide labeling criteria for imports of tuna products and which enable consumers to reject tuna products that do not satisfy U.S. standards.

[119] Yechout, *In the Wake of Tuna II, supra* note 5, at 267.

[120] *See* Kennedy, *A Multilateral Approach, supra* note 90, at 227-28 (proffering that "a better long-term approach for the United States would be to negotiate multilateral environmental conventions based upon international consensus, [which would maintain] American competitiveness in the international economy" and allow for the pursuit of global environmental goals); *see also* Jeffrey R. Pike, *Statement on H.R. 4089 the International Dolphin Conservation Program Act before the Subcommittee on Fisheries Conservation, Wildlife, and Oceans Committee on Resources*, April 9, 1997, *reported in* 4/9/97 CONG. TMY. 10569290 (setting out the goals and purposes of the IDCPA: "(1) develop a mechanism that would implement the Panama Declaration, (2) strengthen the dolphin-safe label to ensure that no dolphins were seriously injured or killed when used on canned tuna, (3) protect the sovereignty of the United States in establishing science-based standards for domestic labeling, (4) improve monitoring of tuna fishing operations, and (5) encourage the IATTC to adopt a bycatch reduction program for ALL yellowfin tuna fisheries in the ETP, including requirements for releasing alive all sea turtles and other threatened and endangered species."). The Panama Declaration is an international agreement entered into on October 4, 1995 between the Governments of Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, Venezuela, and the U.S., which aims to conserve fishery resources in the ETP. United States International Trade Commission, The Year in Trade, 1996: Operation of the Trade Agreements Program, 48th Report [Part 3 of 4], USITC Pub. 3024, *available in* 1997 ITC LEXIS 205, 44 [hereinafter USITC, 1996] (noting the emphatic support of the Clinton administration for the Panama Declaration, which went into effect upon Congress' approval of the IDCPA in August of 1997).

IV. MULTILATERAL ENVIRONMENTAL AGREEMENTS: A STRATEGY FOR AVOIDING A TUNA/DOLPHIN III

In the wake of the Tuna/Dolphin decisions, the U.S. has done little to directly bring the MMPA into conformity with GATT.[121] Pressures from environmental groups and the lack of incentives for other nations to enter into multilateral environmental agreements (MEAs) are primarily to blame for the apathy shown towards the panel decisions. From the environmental point of view, the decisions evidence a retreat from what little global progress has been achieved in reconciling free trade with conservation of the environment.[122] With respect to MEAs, developing countries who rely on fishing to a greater degree than developed countries, see little benefit in internalizing environmental costs.[123] By agreeing to adopt policies that appease the domestic concerns of other contracting members, developing countries may perceive that their own domestic priorities, such as

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[121] *See* PERKINS, DOES MIGHT MAKE RIGHT, *supra* note 9, at 252-53 (expressing fear that by failing to utilize multilateral means of regulating the ETP, the U.S. has missed "the chance to provide meaningful protection for dolphins . . . .").

[122] *See, e.g.* David Stoelting, *International Courts Flourish in 1990s*, N.Y.L.J., Aug. 4, 1997, at S2, (col. 1) (noting that the "Tuna Dolphin decision[s] [were] widely regarded as 'hostile to environmental concerns.' "); *Dolphin-Harmful Legislation Passes House; Defenders Say Congress Weakens Dolphin Protection in Name of Corporate Trade*, U.S. NEWSWIRE, May 21, 1997, *available in* 1997 WL 5712998 (describing House Bill 408, the legislation introduced by Rep. Wayne Gilchrest (R-MD) to implement the Panama Declaration of 1995 as the "dolphin-death" bill, because it acts to lift the tuna embargoes on signatories to the Panama Declaration). This bill was eventually adopted by Congress and established the International Dolphin Conservation Program Act (IDCPA). *See infra* note 136 and accompanying text (discussing the IDCPA and its amendments to the MMPA). The "death-bill" was seen as a response to Mexican demands that the U.S. change its tuna/dolphin policies after the GATT panel decisions, but Rep. Gilchrest stressed that it had nothing to do with the Mexican government and was merely an "environmental solution to a trade problem." Lorraine Woellert, *U.S. May Water Down Law Protecting Dolphins Mexico Uses Trade Threat as Leverage*, WASH. TIMES (D.C.), May 20, 1997, at A1.

[123] *See, e.g.* Daniel P. Blank, Note, *Target-Based Environmental Trade Measures: A Proposal for the New WTO Committee on Trade and Environment*, 15 STAN. ENVTL. L.J. 61, 77-96 (1996) [hereinafter Blank, *A Proposal for the New WTO*] (discussing the diverging viewpoints of developed and developing countries with regard to multilateral and unilateral environmental conservation measures). In particular, the author notes that the fishing trade is crucial to the economies and diets in Africa and Asia. *Id.* at 95. "Developing nations own ninety percent of the coastal waters that lie within the 200-mile fisheries exclusion zones." *Id.* at 96 (citing Polly Ghazi, et. al., *Focus: The Rape of the Oceans*, OBSERVER, Apr. 2, 1995, at 23).

encouraging economic growth, would be neglected.[124]

As a result of the inability to reach any meaningful solution, the U.S. and other similarly developed nations have continued to apply unilateral trade restriction regimes. All this will accomplish is the nascency of another Tuna/Dolphin-like dispute.[125] The U.S. has incrementally reduced the harsh effect of the MMPA through some of the amendments contained in the IDCPA,[126] but political

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[124] *See* Steinberg, *EU, NAFTA, and WTO, supra* note 101, at 243 (stating five reasons developed countries have resisted developing countries positions, one of which being the latter's desire to improve market access for products).

[125] *See* Paul S. Kibel, *Justice for the Sea Turtle: Marine Conservation and The Court of International Trade*, 15 UCLA J. ENVTL. L. & POL'Y 57 (1996-1997) (discussing the landmark case of Earth Island Institute v. Christopher, 922 F.Supp. 616 (Ct. Int'l Trade 1996), where the United States Court of International Trade (CIT), pursuant to the Endangered Species Act, ordered the Secretary of Commerce and the Department of the Treasury to prohibit the importation of shrimp from all countries that had not adopted harvesting methods comparable to U.S. standards for the protection of various endangered turtle species). The situation in *Christopher* is remarkably identical to the Tuna/Dolphin cases and the MMPA's conflict with GATT. One does not have to look too far to see the prospects of another GATT panel decision emerging in the future. *See* John A. Duff, *Recent Applications of United States Laws to Conserve Marine Species Worldwide: Should Trade Sanctions Be Mandatory?*, 2 OCEAN & COASTAL L.J. 1, 17-19 (1996) (addressing the inevitable conflict between Section 609 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act (16 U.S.C. §1537 (1990)) and GATT in the context of the *Christopher* case). However, the United States would seem to have a stronger case in the shrimp-turtle dispute. In September, 1997, the World Wide Fund for Nature (WWFN) reported that all five species of turtles involved in *Christopher* were classified by the United Nations as "threatened with extinction." Frances Williams, *WTO Urged to Heed Case for Turtle-Safe Nets*, FIN. TIMES, Sept. 16, 1997, at 6.

[126] *See* John R. Schmertz & Mike Meier, *In the Aftermath of WTO Tuna-Dolphin Dispute, U.S. Amends Marine Mammal Protection Act of 1972 to Permit Imports of Tuna Harvested in Compliance with International Dolphin Conservation Program*, 3 INT'L L. UPDATE 114 (Oct. 1997) [hereinafter Schmertz and Meier, *In the Aftermath*] (reporting on the passing of the International Dolphin Conservation Program (IDCPA) on August 15, 1997). The IDCPA amends the MMPA to allow the incidental taking of dolphins so long as companies comply with the International Dolphin Conservation Program Act (IDCPA). *Id.* The Inter-American Tropical Tuna Commission (IATTC- an international research organization based at Scripps Institute of Oceanography in La Jolla, California) which was charged with monitoring the incidental takings of dolphins under the MMPA, must conduct studies and recommend the adoption of the IDCPA. IDCPA, Pub.L. No. 105-42 [H.R. 408], 111 Stat. 1122 (Aug. 15, 1997). The IDCPA does little to modify the MMPA except to change the product labeling requirements which was an incidental source of contention in the Tuna/Dolphin disputes. Schmertz and Meier, *In the Aftermath, supra*, at 114.

opposition from environmentalists, who doubt GATT's receptiveness to meaningful conservation measures, have stymied any real comprehensive changes in the Act.[127] Nevertheless, a number of approaches have been put forth that may inspire the international community to recognize the importance of erecting a global framework for the protection of both trade and environmental interests. Some of these approaches are briefly outlined in this section.

A. MEAs

In condemning the MMPA, the Tuna/Dolphin panels relied on the availability of MEAs as an alternative to the U.S.'s unilateral attempt to conserve dolphins.[128] However, it was the failure of these initiatives which instigated the unilateral

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[127] *See, e.g.*, Bernie Sanders, *Left-Right Coalition Comes Together to Defend U.S. Sovereignty in Trade Issues*, GOV'T PRESS RELEASES, Sept. 18, 1997, *available in* 1997 WL 12102846 (manifesting the reason little action has been taken to bring U.S. environmental matters into compliance with GATT by the Congressman Sanders statement that "the people of this country have the right to maintain the level of environmental and food safety standards that they feel are appropriate, and these standards should not be subject to challenge through the WTO by other countries with weaker standards."). To be fair, Congressman Sanders was specifically referring to nations without Democratic forms of government such as LDCs. Yet, even developed countries are bearing the brunt of the unilateral measures of the U.S. when scientific evidence does not even support a finding that dolphins are endangered. *See* Pedrozo, *Unreasonable Extension*, *supra* note 14, at 103-4 (citing U.S. Int'L Trade Comm'n, Pub. No. 2547, Tuna: Current Issues Affecting the U.S. Industry, Report to the Senate Committee of Finance 3-1 (1992), which found dolphins stocks in the ETP healthy and able to sustain viable stock levels).

[128] *See supra* Parts I-II (discussing Tuna/Dolphin Panel Reports). Presumably the Panels recognized the numerous multilateral agreements addressing marine pollution problems to which the United States has acceded to in the past, e.g. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Apr. 30, 1942, 161 U.N.T.S. 193; Convention on Fishing and Conservation of the Living Resources of the High Seas, Nov. 23, 1961, 17 U.S.T. 138, International Convention for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 4 U.S.T. 380, (proclaimed June 30, 1953); U.N. Special Fund Project on Caribbean Fishery Development, Apr. 6, 1966, 19 U.S.T. 4938, Convention for the Establishment of an Inter-American Tropical Tuna Commission, Mar. 3, 1950, 1 U.S.T. 230, Convention for the Safety of Life at Sea, May 26, 1965, 16 U.S.T. 185, Convention on the High Seas, Sept. 30, 1962, 13 U.S.T. 2312, Convention on the Territorial Sea and the Contiguous Zone, Sept. 10, 1964, 15 U.S.T. 1606; *see also* John W. Kindt, *The Effect of Claims by Developing Countries on LOS International Marine Pollution Negotiations*, 20 VA. J. INT'L L. 313, 341 (1980) (outlining over forty-four multilateral marine pollution agreements, among those listed above, to which the U.S. has consented to be bound).

measures taken by the U.S. in the first place.[129] Moreover, it is not clear how existing MEAs, which place restrictions on product or process methods (PPMs) and which appear to discriminate between members and non-members would fair under GATT's most-favored nation (MFN) requirements.[130] For example, the Montreal Protocol on Substances That Deplete the Ozone Layer[131], the Convention on International Trade in Endangered Species[132] (CITES), and the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal[133] are three of the seventeen current MEAs that address environmental problems, in part, through trade provisions which discriminate in favor of member states.[134]

To provide credibility to these agreements and to eliminate the uncertainty as to whether these agreements are in compliance with GATT, measures should be taken to clarify or to amend certain GATT provisions. One approach, proposed by the European Community, would add an exemption under Article XX for agreements that are generally multilateral, provided that each GATT member could accede equally to such agreements, the agreements would not attempt to impose trade restrictions outside their regions of interest, and the United Nations Environmental Program (UNEP) could control the negotiating procedures establishing the

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[129] *See*, Pedrozo, *Unreasonable Extension, supra* note 14, at 95-96 (discussing the IATTC). In 1950, the Inter-American Tropical Tuna Commission (IATTC) accomplished only modest conservation achievements in the ETP. *Id.* at 95. Eventually, the IATTC established a voluntary monitoring and observation program in 1979 in which all of the ETP harvesting nations with significant purse seine fleets agreed to participate in the collection of data to determine MMPA compliance. *Id.* at 96. However laudable the efforts of the participating members were, it did not provide a firm basis for accomplishing the ambitious objectives of the MMPA. *See* Perkins, *Does Might Make Right?*, *supra* note 9, at 215 ("Despite the success of the MMPA and IATTC programs in reducing the dolphin mortality levels, dolphins were still being killed in the eastern Pacific tuna fishery.").

[130] Schoenbaum, *Search for Reconciliation*, *supra* note 3, at 282 ("[T]he validity of many MEA trade restrictions is at least doubtful . . . .").

[131] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, *reprinted in* 26 I.L.M. 1550 (1987).

[132] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087.

[133] Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal Mar. 22, 1989, *reprinted in* 28 I.L.M. 649 (1989).

[134] *See* STEINBERG, EU, NAFTA, AND WTO, *supra* note 101, at 238-40 (1997) (opining, based on the reasoning used by the *Tuna/Dolphin II Panel*, that the discriminatory measures contained the described agreements "would likely be illegal under the WTO Agreements.").

agreements.[135] However, this does not remedy the problem of uncertainty since there is no bright-line definition for the term "multilateral."[136] Would a purely regional agreement be considered a genuinely multilateral agreement?[137]

A second approach would deal with MEAs on a case by case basis. This approach finds support from Daniel C. Esty, author of the book *Greening the GATT*, and the Clinton administration.[138] Esty's approach suggests applying a complicated three-prong balancing test, weighing the concomitant impacts on trade and environmental interests using factors of intent and effect, legitimacy, and appropriateness.[139] However, this approach runs into the definitional problem of identifying which policies are legitimate and which policies are appropriate. Undersecretary of State for Global Affairs Timothy Wirth proposes placing MEAs into categories, considering only those agreements that appropriately bind parties to impose trade restrictions when "the effectiveness of an international

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[135] Blank, *A Proposal for the New WTO, supra* note 123, at 101-4. Ironically, the European Community made the proposal to the GATT Group on Environmental Measures and International Trade in 1992 (just before requesting the dispute panel in Tuna/Dolphin II). *Id.* (citing Directorate-General for External Relations, European Commission, The GATT and the trade provisions of Multilateral Environmental Agreements (Nov. 13, 1992) (unpublished submission to GATT by the EC).

[136] *Id.* at 103 (questioning "how many countries must sign a treaty before it is considered a multilateral agreement?").

[137] *See, e.g.* North American Free Trade Agreement [hereinafter NAFTA], *infra* note 144 (currently bearing the following members: United States, Canada and Mexico- with Chili's membership imminent). Does the membership number in NAFTA constitute enough to warrant a customary principle of international law, the environmental provisions of which non-members should feel obligated to abide by? *See* United States International Trade Commission, USITC Pub. 3043, May 1997/June 1997, *available in* 1997 ITC LEXIS 216. Or is NAFTA merely a regional treaty cloaked in a multilateral shell? *Id.* (providing data supporting evidence of a prosperous (multilateral) trade relationship between the European Union (E.U.) and NAFTA, as well as support for the theory that if the E.U. is willing to enjoy the benefits of the economic strictures within NAFTA, it should also be willing to endure reasonable environmental mandates contained therein).

[138] Blank, *A Proposal for the New WTO, supra* note 123, at 104-08 (detailing DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE (1994), and Undersecretary of State for Global Affairs Timothy Wirth's testimony before the Senate Subcommittee on Foreign Commerce and Tourism, *Administration Unveils New Policy on Sanctions for Environmental Harm*, 11 INT'L TRADE REP. (BNA) No. 6, 221 (Feb. 9, 1994)).

[139] Blank, *A Proposal for the New WTO, supra* note 123, at 106 (describing the difficulty in Esty's endorsement of the "legitimacy" of transboundary measures that threaten or affect the global commons or the "sustainability of an important species or ecosystem.").

environmental or conservation agreement is being diminished."[140] MEAs that only recommend trade sanctions would not fall within the permissible category.[141] However, this approach begs the question of what factors to consider in determining whether the required implementation of trade measures are appropriate. Thus, it seems that approaching MEAs on a case by case basis raises more questions than it answers.

Two more realistic approaches favoring MEAs, suggest either amending Article XX to include a safe harbor provision for MEAs meeting uniform criteria[142] or amending GATT to include the "least-inconsistent" test used in the North American Free Trade Agreement (NAFTA).[143] Article 104 of NAFTA provides that when the obligations of certain specified MEAs conflict with NAFTA obligations, the former requirements should prevail, "provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative least inconsistent with other provisions

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[140] *Id.* at 104 (quoting *Administration Unveils New Policy on Sanctions for Environmental Harm*, 11 Int'l Trade Rep. (BNA) No. 6, 221 (Feb. 9, 1994) [hereinafter WIRTH REPORT]).

[141] *See* WIRTH REPORT, *supra* note 140, at 221 (illustrating the Clinton Administration's unwillingness to impose trade sanctions for violations of MEAs when those agreements do not require sanctions as such).

[142] Schoenbaum, *Search for Reconciliation*, *supra* note 3, at 283-84 (arguing two alternatives for dealing with MEAs, including the following: (1) one which would "add a provision on MEAs . . . ." (2)"[or one that would] adopt a collective interpretation of Article XX" and "validate existing MEAs and provide for notification of future MEAs, as well as set out criteria, a 'safe harbor,' they would have to fulfill to receive approval."). The latter alternative is modeled after Professor Robert Hudec's approach, which would add a new Article XX(k) and would specifically provide for a negotiating mechanism to bring domestic environmental measures into the realm of a legitimately recognized MEA. *Id.* at 284 (citing Robert E. Hudec, *GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices*, 2 FAIR TRADE AND HARMONIZATION 95, 120-42 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996) [hereinafter Hudec, *GATT Legal Restrants*]).

[143] Staffin, *Trade Barrier or Trade Boon?*, *supra* note 118, at 271 (discussing the approach to environmental measures taken under NAFTA; *see also* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 1326 (2d ed. 1996) (noting that former EPA administrator William Reilly described NAFTA as the 'greenest' trade agreement ever negotiated) (internal quotations omitted); Steve Charnovitz, *NAFTA: An Analysis of Its Environmental Provisions*, 23 ENVTL. L. REP. 10067 (1993)[hereinafter Charnovitz, *NAFTA Environmental Provisions*] (providing an excellent analysis of the environmental provisions contained in NAFTA).

of [NAFTA]."[144] This type of test clarifies the status of existing MEAs but calls into question the status of future MEAs since their approval would be conditioned upon being added to the list of specified agreements within NAFTA.[145]

The best way to remedy this potential discrepancy in GATT would be to add a subsection (k) to Article XX. The new exemption must validate existing MEAs and create a mechanism for future MEAs to fall within established criteria before attaining approval. Professor Thomas Schoenbaum suggests reformulating the European Community's approach to Article XX(h) by establishing three criteria that would leave Article XX(k) outside the auspices of the UNEP.[146] Approval would be issued for MEAs that "(1) are open to all parties that have a legitimate interest in the environmental problem addressed; (2) adopt trade restrictions that are reasonably related to the problem addressed; and (3) comply with the jurisdictional norms of international law."[147]

This approach would seem to create the same definitional problems as the balancing test proposed by Daniel Esty. The difference, however is that Schoenbaum's approach places the criteria within the provisions of GATT, whereas the Esty approach requires a crafty interpretation of one of the existing exemptions under Article XX. In effect, Schoenbaum's proposal would render "GATT-proof" trade measures taken pursuant to a valid MEA against other GATT members even

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[144] North American Free Trade Agreement, Dec. 17, 1992, art. 104, *reprinted in* 32 I.L.M. 289, 297. *See generally* HAMILTON LOEB & MICHAEL OWEN, NORTH AMERICAN FREE TRADE AGREEMENT: SUMMARY AND ANALYSIS 109 (1993) [hereinafter LOEB & OWEN, NAFTA] (analyzing environmental regulation under NAFTA). The "specific international agreements" covered under Article 104 include CITES, the Montreal Protocol, the Basel Convention, the US-Canada Bilateral Treaty on Transboundary Movement of Hazardous Waste, and the US-Mexican Agreement on Improvement of the Environment in the Border Area. *Id.* at nt. 19 (citing Article 104 and Annex 104.1 to NAFTA, which allow the member states to add other agreements to the list in Annex 104.1).

[145] Schoenbaum, *Search for Reconciliation, supra* note 3, at 283 (noting also that "an ad hoc approach such as this may be workable for an organization of three states but would not be for the 128-member WTO."). *Cf.* LOEB & OWEN, NAFTA, *supra* note 144, at 110 (noting that Article 904 of NAFTA allows each signatory to "adopt, maintain and apply" standards "related to the safety and environment (as well as protection of consumers), including measures which prohibit importation of goods from another signatory.") (internal quotations omitted).

[146] Schoenbaum, *Search for Reconciliation, supra* note 3, at 283 (concluding that a new Article XX(k) would be preferable to amending an existing exception).

[147] *Id.* at 284. This test is an adjustment of Professor Robert Hudec's proposal to use Article XX(h), similar to the European Community's approach, as a model for MEA approval. *See* Hudec, *GATT Legal Restraints, supra* note 141, at 120-42.

if that other member has refused to sign the MEA.[148] To ensure that the MEA approval process is not abused, the WTO should be consulted and should apply the criteria set forth in the preamble of Article XX which would protect against "unjustified and arbitrary discrimination and disguised restrictions on international trade."[149]

B. The GATT Secretariat's "Carrot" Rather Than "Stick" Approach

In response to the panel decision in Tuna/Dolphin I, the GATT Secretariat issued a special report in 1992.[150] The report admonished the use of any trade measures to protect the environment, justifying the fears that many environmentalist manifested subsequent to the Tuna/Dolphin I decision. Indeed, if the Secretariat's report is to be taken literally, the fact that WTO countries can no longer block the adoption of GATT panel decisions due to the automatic authorization of retaliatory measures created under the 1994 Uruguay Round accord, will undoubtedly instigate new disputes over environmentally motivated trade restrictions.[151] If the WTO adopts the Secretariat's report, the efficacy of both MEAs and unilateral conservation measures will face certain demise.

The Secretariat's approach insists on the use of subsidies as "carrots" rather than the use of trade sanctions as "sticks."[152] "Carrots" are positive trade incentives such as offers to transfer environmental technology and financial assistance to those countries that adopt conservation friendly policies.[153] The Secretariat endorses

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[148] *See* Staffin, *Trade Barrier or Trade Boon?*, *supra* note 118, at 272 (approving the amendment of Article XX to include a new exception).

[149] *But see* Steinberg, *EU, NAFTA, and WTO*, *supra* note 101, at 243 (noting that developing nations have "blocked" proposals to amend Article XX of GATT).

[150] 1 General Agreement on Tariffs and Trade, International Trade 90-91 (1992). The report issued by the GATT Secretariat was a twenty-eight page insert to its 1992 Annual Report. Blank, *A Proposal for the New WTO*, *supra* note 123, at 99.

[151] Howard F. Chang, *Carrots, Sticks, and International Externalities*, 17 INT'L REV. L. & ECON. 309, 311 (1997) [hereinafter Chang, *Carrots and Sticks*] (noting that the 1994 Uruguay Round accords which established the WTO, now give GATT panel decisions some teeth). *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, art. 16, para. 4, art. 17, para. 14, *reprinted in* 33 I.L.M. 1226, 1235, 1237 (1994).

[152] Chang, *Carrots and Sticks*, *supra* note 151, at 312. Mr. Chang has adopted this useful paradigm to illustrate the stratagem of the GATT Secretariat. Dubbing trade incentives as "carrots" and trade sanctions as "sticks", Chang proceeds to analyze and indeed criticize the Secretariat's approach from a microeconomic point of view.

[153] *Id.* (criticizing the use of subsidies to awaken developing countries to the costs of environmental apathy).

these measures as the sole mechanism for achieving transnational environmental protection through trade.[154] Under this regime, also known as the Coase theorem[155], parties will bargain with one another to achieve a more efficient and harmonious solution to environmental and trade concerns than they would through the imposition of specific trade sanctions. However, the Coase theorem does not take into account transaction costs and the free-rider problem.[156]

Multilateral and bilateral agreements require extensive negotiations and consequently take a lot of time to consummate if they are consummated at all.[157] The result of these delays may inflict substantial costs not only on the negotiating parties but on the environment as well. Another problem with the Secretariat's approach is the potential for free-rider nations who will have incentives to understate their interest in the environment to achieve greater trade incentives in agreement negotiations.[158] Countries may actually profit from harming the environment because the negotiating state will offer more trade incentives to secure the cooperation of those countries.[159] Thus, the trade benefits will actually flow to the countries harming the environment rather than to those who manifest interest in protecting the global environment.

The failure of diplomatic negotiations, as already mentioned, is what sparked the Tuna/Dolphin disputes in the first place. If the WTO were to espouse the Secretariat's approach, the status of international trade and the global environment

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[154] *See* Blank, *A Proposal for the New WTO*, *supra* note 123, at 100 (discussing the Secretariat's reasoning behind the "carrots" only approach, was that "unilateral restrictions on trade would never be the most efficient instrument for dealing with an environmental problem.").

[155] *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON., 1 (1960). Howard Chang describes the Coase theorem as a principle which suggests that "as long as parties can bargain with one another, they will reach an efficient solution regardless of the initial allocation of legal rights." Chang, *Carrots and Sticks, supra* note 151, at 312.

[156] *See* Cooper, *Real Global Warming*, *supra* note 2, at 68-70 (describing the free-rider problem that will inevitably plague the recently negotiated Kyoto Agreement in December, 1997). The free-rider problem results from the "wide distribution of expected but distant benefits in response to collective action," which acts as a disincentive for countries to act on global environmental issues. *Id.* at 69.

[157] Chang, *Carrots and Sticks, supra* note 151, at 313.

[158] *Id.* ([free-riders] "will have an incentive to understate [their] interest in protecting the global environment (and to overstate [their] interest in exploiting it), to win a better deal for [themselves] in the negotiations" because of the lack of information each country will have about the preferences of the other nations).

[159] *Id.* at 314-15 (suggesting that providing economic information to nations would be most effective).

will end up right where they started prior to the panel decisions.

C. The International Environmental Management Standard, ISO 14000

In September of 1996, the International Standards Organization [hereinafter ISO] approved ISO 14001 and 14004.[160] These standards permit companies to voluntarily develop environmental management systems (EMSs) to help combine the economic objectives with the environmental objectives of organizations.[161] The principle goal of these initiatives "is to support environmental protection and prevention of pollution in balance with socio-economic needs."[162] Despite the standard's seemingly innocuous voluntary structure, dissention has emerged from developing countries who see the ISO initiatives as a potential non-tariff barrier in violation of GATT's 1994 Agreement on Technical Barriers to Trade (ATBT).[163]

The ATBT employs a NAFTA-like approach to non-tariff barriers, requiring that international standards be no "more restrictive than necessary" to meet their regulatory objectives.[164] Environmental conservation is recognized as a legitimate objective under the ATBT.[165] Therefore, the ISO standards seem impervious to a challenge under GATT since they are not mandatory and further a legitimate objective. However, developing countries are concerned that more industrialized countries will use ISO certification as a means of excluding entry into their

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[160] ISO 14001, 14004: Environmental Management Systems, International Standards Organization (ISO), ISO 14001:1996(E), 14004:1996(E) (Sept. 1, 1996) [hereinafter, ISO 14001, 14004].

[161] Paula C. Murray, *The International Environment Management Standard, ISO 14000: A Non-Tariff Barrier or a Step to an Emerging Global Environmental Policy?*, 18 U. PA. J. INT'L ECON. L. 577, 578 (1997) [hereinafter Murray, *ISO 14000*].

[162] *See* ISO 14001, *supra* note 160, at art. v. (providing also that the standards are not intended to create non-tariff trade barriers "or to increase or change an organization's legal obligations.").

[163] Murray, *ISO 14000, supra* note 161, at 580; s*ee also* Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Agreement on Technical Barriers to Trade, Apr. 15, 1994, *reprinted in* H.R. Doc. No. 103-316, at 1428 (2d Sess. 1994) [hereinafter ATBT] (establishing the impetus for concern from developing nations).

[164] ATBT, *supra* note 163, at art. 2.2. *Compare with* NAFTA, *supra* note 144 and accompanying text.

[165] ATBT, *supra* note 163, at art. 2.2. This is perhaps why ISO 14000 is so attractive to the U.S. Environmental Protection Agency, who is considering requiring compliance as a prerequisite for some programs. Murray, *ISO 14000, supra* note 161, at 580, nt. 19.

markets.[166] If countries are in fact excluded from the global market, the ISO standards will not be furthering their environmental objectives, which will create problems under the ATBT.[167]

It appears that even setting voluntary standards to achieve progress in environmental conservation raises trade barrier issues. Under the current international system, a nation cannot attempt to accomplish indirectly what it is prohibited from doing directly if it affects trade. This conclusion is inevitable because trade and the environment are inexorably linked to each other.[168] A state cannot trade without affecting the environment. A state cannot protect the environment without affecting trade. The only solution is to address the conflict between the environment and trade directly by expressly providing allowances for MEAs in GATT.[169]

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[166] *Id.* at 579; *see also* Herman E. Daly, *From Adjustment to Sustainable Development: The Obstacle of Free Trade*, 15 LOY. L.A. INT'L & COMP. L.J. 33, 36-39 (1992) (hereinafter Daly, *Obstacle of Free Trade*) (discussing why free trade might also make it difficult for developing nations to internalize costs, creating the fear that environmental mandates will stagnate economic development).

[167] Murray, *ISO 1400*, *supra* note 161, at 606-7 (noting that the ATBT allows countries to deviate from international standards only when the international standards would detract from the achievement of the regulatory goal). However, the "burden of proof is on the member to justify such a deviation." *Id.* Since the voluntary standards of the ISO may prevent some developing companies from entering global markets, it will be difficult to show how these standards are furthering the objective of encouraging effective environmental management policies. *Id.*

[168] *See, e.g.*, Kennedy, *A Multilateral Approach, supra* note 90, at 228-33 (discussing the legitimacy resulting from environmental measures incorporated in MEAs); Shultz, *GATT/WTO Committee, supra* note 3, at 423 (analyzing the results of the 1993 Uruguay Round of GATT and the formation of a new Committee on Trade and Environment, which evidences a strong multilateral trend toward commingling free-trade and environmental conservation principles).

[169] *See, e.g.* Michael Porter, *America's Green Strategy*, 264 SCI. AM. 168 (Apr. 1991) (arguing from an economist's perspective that stringent domestic environmental policies actually promote trade, including the quality of products and ultimately international competition); *See also* Daly, *Obstacle of Free Trade, supra* note 166, at 36 (arguing that there is a conflict between domestic environmental measures and free trade because if one country imposes environmental measures, increasing costs, and the other country with whom it conducts trade does not adopt such measures, "the second country will have lower prices and will drive the competing firms in the first country out of business"). *But see* Charnovitz, *Green Roots*, *supra* note 77, at 348-51 (commenting that "GATT should respect national environmental sovereignty" but not to the point where it is unable to control commercial protectionism "disguised as environmental" conservation). The emphasis should be a balance between both trade and the environment. *Id.*

V. CONCLUSION

The new World Trade Organization must allow GATT to be more receptive to MEAs. This is the only mechanism that will offer any meaningful incentive for countries to view the environment from a global perspective. By linking trade with the environment, multilateral conservation efforts will not be construed as trade barriers but as necessary prerequisites to participation in global markets. Those countries who refuse to adopt this view will be left behind. GATT does allow for relaxation of its Most Favored Nation (MFN) treatment for regional organizations that include reasonable environmental provisions. There is no logical basis for prohibiting MEAs that include reasonable trade provisions. The Tuna/Dolphin cases represented the inevitable clash between two laudable goals- environmental protection and free-trade. Resolution of this conflict and future conflicts can only come from the incorporation of both of these objectives into one global regime.

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